FILED
MAY 29 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1039

SAMUEL C. BRODY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN F. COGAN, JR.
60 State Street
Boston, Massachusetts
Attorney for Petitioner

JAMES D. ST. CLAIR
NORMAN B. ASHER
HALE AND DORR
60 State Street
Boston, Massachusetts
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

INDEX.

	Page
Subject	1
Citations to Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Reasons for Granting the Writ	8
1) The decision below is clearly erroneous because the order of January 10 being unlawful by reason of the fact that it did not provide for a plea of the Fifth Amendment, cannot sustain a conviction for criminal contempt	8
2) The trial court committed reversible error in finding the petitioner guilty beyond a reasonable doubt	11
3) The length of the sentence imposed constitutes an abuse of discretion on the part of the trial judge	14
Conclusion	15
Appendix A (Additional Statutes)	16
Appendix B (Opinion of Court of Appeals)	20

CITATIONS.

Cases:

Anderson v. *Dunn*, 6 Wheat, 204, 231	11
Ballantyre v. *United States*, 237 F.(2) 657 (C.A. 5, 1956)	12
Carlson v. *United States*, 209 F.(2) 209 (C.A. 1, 1954)	10
Gallaway v. *United States*, 319 U.S. 372	13
Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418, 444	11
In re Michael, 326 U.S. 224, 227	11
Maffie v. *United States*, 209 F.(2) 225 (C.A. 1, 1954)	10

Page

Michaelson v. *United States*, 266 U.S. 42, 66 11
Nilva v. *United States*, 352 U.S. 385 14
Nye v. *United States*, 313 U.S. 33, 44-48 11
Offutt v. *United States*, 348 U.S. 11 15
Quinn v. *United States*, 349 U.S. 155 10
Sacher v. *United States*, 343 U.S. 1 15
Spies v. *United States*, 317 U.S. 492 12
Traub v. *United States*, 232 F.(2) 43 (C.A. D.C., 1955) 10
United States v. *Bardin*, 224 F.(2) 255 (C.A. 7, 1950 cert. den. 350 U.S. 883 12
United States v. *Costello*, 222 F.(2) 656 (C.A. 2, 1955, cert. den. 350 U.S. 847 12
United States v. *Courtney*, 236 F.(2) 921 (C.A. 2, 1956) 12
United States v. *Gordon*, 236 F.(2) 916 (C.A. 2, 1956) 12
United States v. *Hoffman*, 341 U.S. 479 ..... 8, 10, 13
United States v. *Zwillman*, 108 F.(2) 802 (C.A. 2, 1940) 12
Wiggins v. *United States*, 64 F.(2) 950 (C.A. 9, 1933) cert. den. 290 U.S. 657 14

Constitution and Statutes:

United States Constitution, Amendment V 2, 5, 8, 9, 10, 11
18 U.S.C. § 371 ..... 12, 16
18 U.S.C. § 401 ..... 2, 8, 11
26 U.S.C. § 6531 ..... 14, 16
26 U.S.C. § 7203 ..... 12, 14, 17
26 U.S.C. § 7402 17
26 U.S.C. § 7602 ..... 4, 18
26 U.S.C. § 7604 ..... 4, 19

Supreme Court of the United States

OCTOBER TERM, 1956

No.

SAMUEL C. BRODY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 26, 1957.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in Appendix B hereto, infra p. 20 is reported in F.(2) , 57-1 USTC Paragraph 9606. The opinion of the District Court dismissing a motion to dismiss the attachment for

contempt on jurisdictional grounds is reported at 146 F. Supp. 749. (R. 14-17). The opinion of the District Court on the merits of the contempt attachment is reported at 147 F. Supp. 897 (R. 20-28).

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

Statutes Involved

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. 401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

The following additional statutes involved appear at Appendix A: 62 Stat. 701, 68A Stat. 873, 68A Stat. 851, 68A Stat. 815.

Questions Presented

1) Was the District Court required to afford Petitioner an opportunity to invoke his constitutional privilege against self-incrimination in the framing of an order directing the Petitioner to answer in writing certain incriminating questions?

2) Did the government prove beyond a reasonable doubt that the Petitioner was guilty of the criminal contempt?

3) Was the sentence of the District Court so severe as to constitute an abuse of discretion?

Statement of the Case

The Court of Appeals for the First Circuit affirmed the judgment of the United States District Court for the District of Massachusetts (Aldrich, J.) judging the Petitioner guilty of criminal contempt for failure to comply with an order of that court dated January 10, 1956 (R. 6) in which the Petitioner was ordered to submit to the Internal Revenue Service a written statement under oath in answer to certain questions relating to the location and disposition of property owned by him individually or as trustee and relating to the date, amount and nature of every expenditure by the Petitioner in excess of $500.00

from November 4, 1955. At the time of the order the Petitioner was in Florida.

Prior to the issuance by the district court below of its order of January 10, 1956, a duly authorized agent of the Internal Revenue Service had caused a summons (Form 2039) to be served upon Petitioner "to give testimony relating to the tax liability and/or the collection of the tax liability of the above named person for the period(s) designated" pursuant to the provisions of Section 602 of the Internal Revenue Code (26 U. S. Code 7602). This summons originally was returnable on December 16, 1955 at the offices of the Internal Revenue Service in Boston, Massachusetts, but at the request of counsel for the Petitioner, it was advanced to December 14, 1955. On this date, counsel for Petitioner appeared at the offices of the Internal Revenue Service and stated that the Petitioner was physically unable to appear to testify in response to the summons. Petitioner himself went to Florida on December 15, 1955. When he arrived in Florida, Petitioner had a heart attack and was substantially incapacitated for several weeks (R. 15, 29).

Prior to this time, proceedings had been instituted in the Tax Court by Petitioner relating to alleged deficiencies in federal income tax for the years 1942 through 1946. On November 4, 1955, the Internal Revenue Service made a jeopardy assessment and on November 17, 1955, the Internal Revenue Service levied upon his assets in the amount of $470,370.21. In the meantime, however, Petitioner had sold or otherwise disposed of a substantial amount of property (R. 21).

As a result of Petitioner's failure personally to respond to the summons, a petition for an attachment as for contempt was brought against Petitioner in the District Court below pursuant to the provisions of Section 7604(b) of the Internal Revenue Code (26 U. S. Code 7604) (R. 20)

and an order to show cause was issued on December 29, 1955, returnable January 10, 1956. Upon the return day of the order to show cause Petitioner appeared by counsel only, who stated to the court that Petitioner was physically unable to appear in person at that time. The court later found this statement to be factual (R. 23). The court ordered a physical examination of Petitioner by a Public Health Officer in Florida and pending such examination ordered that Petitioner submit answers to certain questions in writing to one Myles P. McCabe, collection officer of the Internal Revenue Service. (R. 6). It was this order that was the basis for the later criminal contempt proceedings.

Thereafter, on January 27, 1956, Petitioner, by his attorney, filed an answer to the petition for an attachment denying that any tax liability existed and alleging that Petitioner was absent from the jurisdiction on account of his health and was, therefore, unable to respond to the summons issued by the Internal Revenue Service. (R. 23).

At the hearing, resulting in the judgment from which this appeal was taken, Petitioner testified in substance that while he received a copy of the order of January 10, 1956 in due course (R. 58), he did not have the records required to answer, and further that he feared that the answers might tend to incriminate him (R. 58). He also understood from his attorney, however, that he could plead the Fifth Amendment only in person in court (R. 58). Upon a rehearing granted by the court below, counsel for Petitioner testified in substance that prior to the filing of an answer, Petitioner had informed him that he wanted to plead the Fifth Amendment (R. 116), but that he advised him he would have to do it in person in court and that it was not appropriate to plead it in the answer to the petition.

One counsel for Petitioner testified that he also advised that he didn't believe that reliance on the privilege was

warranted, since the statute of limitations had expired for criminal prosecution for the taxable years in question. (R. 105).

No reply having been received to the question propounded in the order of January 10, 1956, the Government on January 19, 1956 moved for the issuance of a bench warrant for Petitioner, to have him brought to Boston, but this was denied pending the receipt of a report from the Public Health Officer (R. 32). A further medical examination was ordered by the court on January 31, 1956, to be held in Florida (R. 36), resulting in a finding by the court entered on July 12, 1956 that Petitioner was not then able to appear before the Internal Revenue Service or the court to testify (R. 38).

Petitioner returned to Boston in April of 1956 and shortly after this was confined to a Boston hospital for three weeks as a result of another heart attack in the middle of June, 1956 (R. 25, 59).

Also on July 12, 1956, the court below issued a further order that Petitioner furnish counsel with the information called for in the order of January 10, 1956 and that counsel transmit the same to the Internal Revenue Service (R. 13). In response to this order counsel for Petitioner conferred with him and on July 16, 1956, counsel informed the Internal Revenue Service in writing that Petitioner refused to answer the questions on the grounds that the answers might tend to incriminate him (R. 26).

Previously on June 11, 1956, the United States of America had filed a Petition for an Attachment as and for Criminal Contempt against Petitioner (to which the court below added a count on its own motion for failure to comply with the order of the court of July 12, 1956; see: opinion of January 11, 1957 at p. 20 of the Record), for his failure to comply with the order of the court of January 10, 1956. An order to show cause was issued on the same day, re-

turnable on June 20, 1956 (R. 9). On this date, Petitioner by his attorney filed an answer denying the allegations of the petition and stating that Petitioner was confined in a hospital in Boston (R. 9) as a result of a heart attack and was unable to appear in court. Thereafter Petitioner, by his counsel, filed a motion to dismiss which was denied (R. 14).

After further physical examinations pursuant to motion, a hearing was held on the petition for criminal contempt at which Petitioner was present in person for the first time in any of these proceedings. At this hearing, Petitioner testified, but he was not permitted to respond to the questions contained in the order of January 10, 1956 or the order of July 12, 1956. (R. 71-72). The Court below found Petitioner guilty on December 27, 1956. On that day, the court, however, reopened the case on all points (R. 19-20), primarily to permit counsel for Petitioner to testify as to Petitioner's reliance upon the Fifth Amendment (R. 22). Further hearings were held on January 4, 7, and 11 resulting in a judgment of guilty against Petitioner for his failure to comply with the order of January 10, 1956. The court below did not pass upon the count for criminal contempt for failure to answer the questions propounded in the order of July 12, 1956 to which Petitioner, through his counsel had refused to answer on the grounds that the answers might tend to incriminate him. Upon this judgment, Petitioner was sentenced to imprisonment, for one year, which sentence has been stayed pending the appeal to the Court of Appeals, and this Petition for Certiorari.

There were two appeals filed with the Court of Appeals in this case. (R. 29, 30). The Court of Appeals decided No. 9207 on its merits; and entered judgment dismissing No. 9209 (certified R. 255) because after the order of Court on February 21, 1957 (certified R. 232, 233) it was but a

duplication of No. 9207. The mandates in both cases were stayed by order of the Court on May 1, 1957 (certified R. 256).

Reasons for Granting the Writ

The grant of a writ of certiorari is appropriate in this proceeding because of the fundamental principle of due process involved in the determination of the permissible scope of orders of the District Courts which attempt to elicit by a writing certain information which may tend to incriminate the recipient, and because of the importance of such determination to the relationship of the federal courts to federal administrative agencies.

1. *The decision below is clearly erroneous because the order of January 10, being unlawful, by reason of the fact that it did not provide for a plea of the Fifth Amendment, cannot sustain a conviction for criminal contempt.*

No Court of the United States has ever held that the Fifth Amendment can be appropriately invoked by mail. On the contrary the essence of the protection afforded by the Fifth Amendment is that it can only be invoked under circumstances which provide an immediate hearing before a Court of competent jurisdiction. *United States* v. *Hoffman*, 341 U.S. 479. Any order of a court which affords no opportunity for a judicial determination of the adequacy of the plea is unlawful and therefore a conviction for criminal contempt based upon an alleged intentional refusal to comply with such order cannot stand. See 18 U. S. C. 401. The opinion of the court below is based upon the assumption that no burden was placed upon the Petitioner to indicate his interest or reliance on the Fifth

Amendment. However, the Court finds beyond a reasonable doubt that even if the Petitioner had been before an appropriate forum, within the seven day period after January 10, 1956, that his refusal to answer the questions at that time would have been for reasons other than a genuine apprehension that the true answers to the questions contained in the January 10th order. It is submitted that the finding of the District Court as affirmed by the Court of Appeals insofar as it relates to the genuineness of the Petitioner's apprehension must be classified as irrelevant speculation, because it assumes not that the January 10th order was lawful but only that by its terms the Petitioner was not obliged to raise the Fifth Amendment issue until June 21, 1956 in response to the order of the District Court to show cause why the Petitioner should not be cited for contempt. It should be noted that after the show cause order was made on June 11, 1956, the Petitioner was deprived of any opportunity to invoke the Fifth Amendment before the Court in response to the questions contained in the January 10 order, because the only issue then before the court was the petition for attachment for criminal contempt filed by the government on June 11.

Much is made of the fact that the Petitioner left for Florida after the summons was issued by the Internal Revenue Service in December 8, 1955 without explanation. However, there is no doubt that after he arrived in Florida he became ill, and that the District judge found

> "There is no question but that respondent's health was not good, and as a result of medical opinion, following examination, I did not order him to appear." (R. 23, footnote 2)

In not ordering the Petitioner to appear or in not devising some other procedure which would bring the Petitioner

before the United States District Court in Florida, for example, the District Court committed fatal error. The humanitarian motives notwithstanding, the issuance of the order of January 10 which provided only for a plea by mail of the Fifth Amendment was illegal, and cannot support the attachment for contempt. This view is supported by the admonition of this Court in *United States* v. *Hoffman* (supra) that the Fifth Amendment must be accorded liberal construction in favor of the right it was intended to secure. This construction is buttressed by the presumption of innocence accorded a defendant in a criminal case. *Quinn* v. *United States*, 349 U.S. 155.

Whether the Petitioner's apprehension about the Fifth Amendment were well founded must be irrelevant to the legality of the order. The failure of the Court of Appeals to rule that the order was illegal causes some concern in view of its decisions *Maffie* v. *United States*, 209 F(2) 225 (C.A. 1, 1954) and *Carlson* v. *United States*, 209 F(2) 209 (C.A. 1, 1954) which hold that the privilege of the Fifth Amendment must be pleaded in person and before a court in order to meet the test of due process. The January 10 order deprives the Petitioner of the protection of the rule that no contempt can lie unless a refusal to answer follows an adverse ruling by a Court in the claim or privilege under clear direction thereafter to answer. *Traub* v. *United States*, 232 F(2) 43 (C.A. D.C. 1955).

It is no answer to say that the defect in the order is cured in this case by the availability of counsel to invoke the Fifth Amendment on behalf of his client, and thereby present the matter to the Court for further decision. No case has held that anyone but the witness himself may plead the Fifth Amendment with respect to his own apprehensions.

The Court of Appeals falls into fatal error when it concludes at page 19 of its opinion (Appendix B)

> " • • • the very least Brody would have had to show, at the trial on a change of criminal, was that he had failed to obey the court of January 10 *because of* the Fifth Amendment privilege: • • • ".

The Court ignores the fact that the unlawfulness of the order itself constitutes a defense under the statute. (18 U.S.C. 401 (3)).

2. *The Trial Court committed reversible error in finding the Petitioner guilty beyond a reasonable doubt.*

Even if it is assumed that the January 10 order is a lawful one, the conviction of the Petitioner for criminal contempt cannot be sustained because the evidence introduced at the trial on December 11 indicates that there was at least a reasonable doubt as to the Petitioner's guilt. The burden imposed on the District Court was a very heavy one because the trial for contempt is presided over by a judge without a jury, and because the District Judge in this case determining the question of guilt at the trial also issued the January 10th order. Congress has limited the power of contempt to "the least possible power adequate to the end proposed." *In re Michael*, 326 U.S. 224, 227, *Nye* v. *United States*, 3, 3 U.S. 33, 44-48, and *Anderson* v. *Dunn*, 6 Wheat, 204, 231.

To convict the Petitioner of criminal contempt it was necessary for the government to overcome the presumption of innocence which attaches to him, and to prove him guilty beyond a reasonable doubt. *Gompers* v. *Buck's Stove and Range Co.*, 221 U.S. 418, 444; *Michaelson* v. *United States*, 266 U.S. 42, 66.

The finding of guilt by the Court was based upon evidence which cannot by any recognized standard meet the reasonable doubt safeguard. On the issue of wilfullness

the Petitioner by competent testimony (R. 105, 115, 116, 117, 118) introduced evidence which indicated that the failure to answer the January 10 order was based upon reasonable apprehension of self crimination. This testimony corroborates what might be considered the normal state of mind of a recipient under the circumstances of this case. It taxes credulity that the Petitioner would not be apprehensive about self-incrimination, with his prior criminal record, on parole from a prior criminal conviction at the time of the January 10 order, with his assets subject to a jeopardy assessment in the amount of $663,000, coupled with the fact that he might be subject to criminal penalties for any wilful conspiracy to defraud the United States by transferring assets under the jeopardy assessment or for wilful failure to pay the taxes due or supply information with respect thereto. See 18 U.S.C. 371 and 26 U.S.C. 7203. *Spies* v *United States,* 317 U.S. 492; See *United States* v. *Bardin,* 224 F.(2) 255 (C.A. 7, 1950 cert. den. 350 U.S. 883; *Ballantyre* v. *United States,* 237 F.(2) 657 (C.A. 5, 1956); Cf. *United States* v. *Courtney,* 236 F.(2) 921 (C.A. 2, 1956); *United States* v. *Gordon,* 236 F.(2) 916 (C.A. 2, 1956). Together with the reaction outlined above which a healthy man similarly situated would have, the Petitioner, after his arrival in Florida suffered a serious heart attack (R. 15, 59) and was as a result very concerned about his health in view of the fact that he had suffered from a number of attacks in the past. (R. 176, 177).

In determining the validity of a claim of privilege where the defendant is sworn and is before a court all the relevant facts and circumstances, including past criminal record, must be considered. *United States* v. *Costello,* 222 F.(2) 656 (C.A. 2, 1955), cert. den. 350 U.S. 847; *United States* v. *Zwillman,* 108 F.2d 802 (C.A. 2, 1940). The witness invoking the privilege need not prove that his testimony will incriminate him, but need only show that the

testimony may become a link in a chain of incriminating circumstances *Hoffman* v. *United States* (supra). It is submitted on the issue of criminal intent in this case, a lesser showing sustains the Petitioner's burden in proving a reasonable doubt because the appropriateness of the plea is not before the Court except insofar as it bears on the wilfullness issue in the contempt proceeding.

The failure of the Court to credit the testimony of the Petitioner as well as his witnesses against the situation confronting the Petitioner on January 10 constitutes a clear abuse of discretion. See *Gallaway* v. *U. S.*, 319 U.S. 372 on degree of credence which must be given to testimony of defendant's witnesses.

The District Court and the Court of Appeals conclude from the admission in the Answer filed on January 28, 1957 in response to the petition for attachment as for contempt filed by the United States Attorney on behalf of the Internal Revenue Service that the Petitioner possessed approximately $330,000 in response to the Sixth Allegation (R. 191) that the Fifth Amendment had been effectively waived and therefore no longer was considered by the Petitioner to be the basis of his refusal to answer the January 10 order. But a careful examination of the contempt petition (R. 190-193) and the January 10 order (R. 6-8) indicates that the January 10 order demanded much more information of the Petitioner than indicated by the petition the answer to which seems so fatal to the Petitioner's cause. The January 10 order requires information with respect to expenditure, the disposition of the $330,000, only the existence of which is alleged in the Sixth allegation of the contempt petition, and a full and statement of all assets whether held by the Petitioner or held by others for him or held in a certain Trust. In short the January 10 order required information which could reasonably cause apprehension on account of incrimination,

because the Petitioner had reduced certain assets to cash after the jeopardy assessment. (R. 21). The state of mind required to sustain criminal contempt cannot be inferred from the answer of counsel for Petitioner to a different inquiry, which merely admits the existence of funds which from the direct evidence could hardly be denied.

The Courts below read too much into the mere admission of the existence of funds. An inference from such admission as to the Petitioner's state of mind with respect to the questions propounded in the January 10 order cannot be made without a denial of due process which cannot be countenanced by this Court.

Any disposition of assets in violation of the jeopardy assessment could well have subjected to criminal prosecution under Section 7203 (Appendix B) of the 1954 Internal Revenue Code, notwithstanding the fact that the Statute of Limitations had run on the actual tax years themselves. See Section 6531 of the 1954 Internal Revenue Code. (Appendix B) The Statute of Limitations runs from the date of the commission of the crime. *Wiggins* v. *United States*, 64 F.2d 950 (C.A. 9, 1933) cert. den. 290 U.S. 657.

The finding of the District Court that the guilt of the Petitioner had been proved by the government beyond a reasonable doubt is insupportable in view of the fact that the government introduced no direct evidence that the Petitioner did not believe that an answer to the questions set forth in the January 10 order might incriminate him, in order to sustain its burden on the willfulness of the alleged contempt.

3. *The length of the sentence imposed constitutes an abuse of discretion on the part of the trial judge.*

The length of the sentence imposed by the trial court, in view of the record, presents a substantial question of

abuse of discretion. No case has been found similar to the situation presented herein where such a long sentence has been imposed and sustained. See *Nilva* v. *United States*, 352 U.S. 385 where sentence of a year and a day imposed on account of conviction are three counts of criminal contempt, was vacated and the case was remanded to Court in order to permit the District Court to reconsider the sentence in view of the fact that the government confessed error in two of the three counts. See also *Offutt* v. *United States*, 348 U.S. 11 (ten days' sentence reduced by the Court of Appeals to forty-eight hours). *Sacher* v. *United States*, 343 U.S. 1 (six months).

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN F. COGAN, JR.
60 State Street
Boston, Massachusetts
Counsel for Petitioner

JAMES D. ST. CLAIR
NORMAN B. ASHER
HALE AND DORR
60 State Street
Boston, Massachusetts
Of Counsel

Appendix A

18 U.S.C. 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . . June 25, 1948, c. 645, 62 Stat. 701.

26 U.S.C. 6531. *Periods of Limitation on Criminal Prosecutions.*

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof; * * *

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations; * * * August 16, 1954, 9:45 a.m. EDT, c. 736, 68A Stat. 815.

26 U.S.C. 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

26 U.S.C. 7402. *Jurisdiction of district courts*

(a) To issue orders, processes, and judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person

resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 873.

26 U.S.C. 7602. *Examination of books and witnesses.*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 901.

26 U.S.C. 7604. *Enforcement of summons*

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6402(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 902. As amended Apr. 2, 1956, c. 160, sec. 4(i), 70 Stat. 91; June 29, 1956, c. 462, Title II, sec. 208(d)(4), 70 Stat. 396.

Appendix B

United States Court of Appeals
For the First Circuit

No. 5207.

SAMUEL C. BRODY,
RESPONDENT, APPELLANT,
v.
UNITED STATES OF AMERICA,
PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[147 F. Supp. 897]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

James D. St. Clair, with whom *Hale and Dorr* was on brief, for appellant.

Andrew A. Caffrey, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, and *George H. Lewald*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.
April 26, 1957.

MAGRUDER, *Chief Judge*. This is an appeal by Samuel C. Brody from a judgment of the United States District Court for the District of Massachusetts finding him guilty of a criminal contempt under the provisions of 18 U.S.C. § 401.[1] The contempt consisted of a failure to obey an order entered

[1] 18 U.S.C. § 401. Power of court.
A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as— . . .
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

by Judge Aldrich on January 10, 1956, in a civil action captioned *John J. Duffy, Acting Group Supervisor, Internal Revenue Service* v. *Samuel C. Brody*. This order in substance required Brody to submit to a collection officer of the Internal Revenue Service under oath and in writing answers to questions relating to the disposition and location of certain of his assets. Though Brody had ample opportunity to comply with this court order, it is clear that he willfully and deliberately refrained from doing so. An asserted excuse, based upon the privilege of self-incrimination, will be dealt with later in this opinion. Despite the earnestness of the presentation by counsel for appellant, we are satisfied that this is a clear case requiring affirmance of the judgment under review.

The events leading up to Brody's conviction began on November 4, 1955, when the Internal Revenue Service entered a jeopardy assessment against him for unpaid income taxes for the years 1942-1946 in the amount of $663,629.31 and demanded payment. (26 U.S.C. § 6331 (a).) Commencing a few days after receipt of this demand, Brody proceeded to liquidate a substantial block of securities from which he realized in cash, as of November 29, 1955, the sum of $330,000.00.

On December 6, 1955, the Internal Revenue Service served a summons upon Brody, stated to have been issued under authority of § 7602 of the Internal Revenue Code of 1954, which directed him to report on December 16, 1955, at the office of Myles P. McCabe, an officer of the Internal Revenue Service in Boston, Massachusetts, to give testimony relating to his tax liability. Section 7602, together with other relevant sections of the Internal Revenue Code of 1954, is copied in the footnote.[2]

---

[2] Sec. 7210. Failure to obey summons.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other

On December 7 or 8, 1955, Brody told his counsel, Arthur Gottlieb, Esq., that he would not appear at the revenue office in response to this summons. On December 8 Mr. Gottlieb requested that the hearing be advanced from December 16 to December 14 but did not state a reason for such request.

Mr. Gottlieb appeared on December 14, 1955, at the revenue office and stated that Brody had told him that he was physically unable to be present and also that he probably would not be able to appear for at least a year. The revenue officer requested Mr. Gottlieb to inquire of Brody whether the hearing could not be held on that very afternoon. Later in the day Mr. Gottlieb reported back that Brody had been

---

papers, as required under sections 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Sec. 7402. Jurisdiction of district courts.

(a) To Issue Orders, Processes, and Judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Sec. 7601. Canvass of district for taxable persons and objects.

(a) General Rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

advised by his doctor not to appear. On the next day, December 15, 1955, Brody left for Florida by airplane without leave of the revenue office and without notice.

As a result of Brody's failure to respond to the summons, a civil action was commenced against him in the United States District Court for the District of Massachusetts on December 29, 1955, by petitioner John J. Duffy, Acting Group Supervisor, Delinquent Accounts and Returns Branch, Internal Revenue Service. The petition recited that it was brought under the provisions of § 7604 of the Internal Revenue Code of 1954. The petitioner asked the court to issue an order to Brody to show cause why his person should not be attached "as for contempt" and to show cause why he should not be ordered to appear on a

---

Sec. 7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 7603. Service of summons.

A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an

day fixed by the court before the Internal Revenue Service and testify as directed by the summons. The petition concluded, in the usual form, with a request for "such other order or relief as this Court may deem just and proper." Though this petition is entitled "Petition for Attachment as for Contempt" and though a similar phrase is contained in § 7604(b), the proceeding was not strictly one of contempt, but was more accurately a proceeding to obtain the assistance of the court in forcing Brody to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be a contempt punishable by the court. It is true that § 7210 of the Internal Revenue Code makes it a crime for a person who, being duly summoned to testify as required by § 7602, neglects to do so. But presumably

---

application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Sec. 7604. Enforcement of summons.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

a conviction of this offense could only be had upon a regular criminal prosecution, with the right of trial by jury. Brody could not have been punished summarily by the court for a contempt of court for his failure to obey the summons of the Internal Revenue Service.

Upon consideration of the foregoing petition by John J. Duffy, the district court entered an order on December 29, 1955, directing Brody to appear before it on January 9, 1956, "and then and there show cause, if any, as to why his person should not be attached as for contempt." Brody did not personally appear in court as directed by this order to show cause; at the hearing Mr. Gottlieb appeared in opposition to the entry of an order for attachment and asserted that Brody was physically disabled. As Mr. Gottlieb did not have specific authority to represent Brody, the matter was continued to the following day, January 10, 1956, at which time Mr. Gottlieb informed the court that he had spoken with Brody and was authorized by him to enter a general appearance, which he did.

Government counsel submitted a draft of a proposed order whereby Brody would be required to state under oath, and in writing, answers to certain questions respecting the disposition of the funds realized from the recently liquidated securities, and other financial information. It was proposed by counsel for the government that Brody prepare his answers in Florida and send them to the collection officer in Massachusetts. Mr. Gottlieb expressed his opinion that this was a "reasonable request under the circumstances." After a further colloquy the court said: "In view of the rather extraordinary circumstances of the defendant not being here before the Court, that we have adverted to in the past, I will enter such an order". Mr. Gottlieb put his initials upon the order as indicating his approval. The court entered the order so drawn on January 10, 1956. This

order, the disobedience of which was the basis of the finding of criminal contempt herein, is summarized in the footnote.[3]

Brody at no time obeyed the order of January 10, 1956, of which he had full personal knowledge within at least seven days of its issuance. Mr. Gottlieb represented to the court that Brody was physically unable to answer, and several hearings were held with respect to his physical condition. On January 19, 1956, an oral application was made for a bench warrant to compel Brody's personal presence. The court did not pass on this motion for lack of medical evidence from which the true state of Brody's condition might be determined.

Against the background of this claimed disability, the record shows that when the request was made to advance the hearing from December 16 to December 14, 1955, neither Mr. Gottlieb nor Brody advised the revenue officials that

---

[3] By the order of January 10, 1956, the court ordered Brody to submit to Collection Officer Myles P. McCabe, Internal Revenue Service, 174 Ipswich Street, Boston, Massachusetts,

"within seven days after entry of this Order a written statement under oath of the following:

"(1) The date, amount and nature of each and every expenditure by him in excess of $500 since November 4, 1955."

(2) The disposition of the proceeds of certain described checks drawn by H. C. Wainwright & Co. and endorsed and cashed by Brody, and the present location of any property acquired with such proceeds.

"(3) If the proceeds of the aforementioned checks have not been disposed of, a statement of the present whereabouts of such proceeds.

"(4) A full and complete statement of all assets whether held by the respondent or held by others for him or held by him for the Charles Trust, so-called, of every kind and nature, their present location, and their present value.

"It is further ordered that commencing with the seventh day after entry of this Order and until further notice, at the end of every seven-day period the respondent shall submit to the said Collection Officer Myles P. McCabe a written statement under oath of the amount of his expenditures during such seven-day period and of any changes in form, amount or location of the assets enumerated in the sworn statement required by this Order to be submitted."

Brody had an airplane reservation to Miami for December 15, 1955, and that he had made such reservation well before that date. Nor were the officials informed of this on December 14 when Mr. Gottlieb reported appellant's ill health. The record further shows that Brody did not see his regular physician, Dr. Kramer, until the *afternoon* of December 14; the meeting was not at Brody's home but at Dr. Kramer's office, and the doctor did not "know what prompted this visit." Apparently it was short. "He came in, said hello, good-bye . . . ." It seems he did not go to Dr. Kramer for treatment and none was given.

After Brody's arrival in Miami he suffered a heart spasm at his hotel which kept him in bed for several days. His Miami physician attributed this attack to the strain of travel. Following this spasm Brody was not hospitalized but continued to live at his hotel and made visits to the doctor at his office in the same hotel about once a week.

Brody returned to Boston by airplane in April, 1956, but he never made any move to comply with the court's order of January 10. As a result, on June 11, 1956, the United States Attorney, on behalf of the United States, filed a petition against Brody for attachment for criminal contempt under 18 U.S.C. § 401. Upon consideration of this petition, on the same day, the district court entered an order directing Brody to file his answer to the petition in writing and to appear personally before the district court on June 22, 1956, "and then and there show cause, if any, as to why he should not be adjudged in criminal contempt."

On June 21, 1956, an answer was filed in Brody's behalf by Mr. Gottlieb which in substance admitted the factual allegations of the criminal complaint but asserted that the court was without jurisdiction or authority to enter its order of January 10, 1956. Further, the answer stated: "The Respondent's attitude toward this Court has never been contemptuous. He attempted merely, in his difficult

situation, to improve his position for negotiating a settlement of the claimed tax liability." Nothing was said in the answer about any privilege against self-incrimination. There was an additional statement in the answer that Brody was confined to the hospital as a result of another heart attack suffered by him on June 14, 1956, and therefore that he could not personally appear before the court on June 22, as ordered. When Brody did not appear in court on that day, the court appointed a physician to make a medical examination of him, and this physician's report was filed July 5, 1956.

Thereafter, on July 12, 1956, the court entered a further order directing in substance that appellant through his attorney submit the information required by the January 10 order to the collection officer. Brody did not obey this order, and through his attorney advised the collection officer that he refused to respond to the order on the ground that his answers might tend to incriminate him. This is the first time that reliance on the Fifth Amendment by Brody was brought to the attention of any representative of the United States or to the attention of the court.

On August 27, 1956, Brody filed a motion that the petition for criminal contempt be dismissed on the ground that the district court lacked jurisdiction to enter its order dated January 10, 1956. This motion was denied by the court in an opinion filed September 19, 1956. 144 F. Supp. 749. On November 15, 1956, the government filed a motion for a new physical examination, and the examining physician reported on November 23 that Brody was able to stand trial. The trial on the charge of criminal contempt was held on December 11, 1956, Brody then being personally present in court.

An opinion concluding that Brody was guilty of criminal contempt was handed down on the morning of December 27, 1956. The question of sentence was argued in the afternoon

of the same day, at which hearing Mr. Gottlieb referred to the fact that the court's opinion had commented on the failure of Brody's attorneys, Messrs. Gottlieb and Murray, to corroborate Brody's testimony regarding the Fifth Amendment, and stated: "both Mr. Murray and myself were asked by Mr. Brody, as late as the latter part of January anyway, to plead the Fifth Amendment for him". At the court's suggestion a motion to reopen the proceeding for criminal contempt was made, and the court entered an order reopening the proceedings for all purposes, including the taking of any proper evidence any party wished to offer on the question whether response to the order of the court might have involved incrimination. After a further hearing on January 4 and 7, 1957, the district court filed an opinion on January 11 concluding again that the defendant was guilty of criminal contempt. 147 F. Supp. 897. A formal judgment was entered on the same day adjudging the defendant in criminal contempt for failure to respond to the court's order of January 10, 1956, and sentencing the defendant to a term of imprisonment for one year. The present appeal was taken from this judgment of conviction.

Appellant advances several grounds for reversal of the judgment of the district court. The first ground goes to the jurisdiction of the district court and thus challenges the lawfulness of the order of January 10, 1956. It is maintained that when a taxpayer fails to comply with a summons of the Internal Revenue Service issued under 26 U.S.C. § 7602, the district court can proceed only in strict accordance with the enforcement provisions of 26 U.S.C. § 7604(b). Accordingly it is said that, as a condition precedent to the power of the district court to enter any enforcement order under that section, it is necessary for the court to issue an attachment for the arrest of the taxpayer so as to bring him personally into the court. We find no such condition precedent in the terms of § 7604(b),

which states it to be "the duty" of the judge to hear the application for enforcement filed by the Revenue Service and, "if satisfactory proof is made," to issue an attachment for the arrest of the taxpayer. But the section does not imply that the court is powerless to proceed to a hearing of the case when the taxpayer, being duly notified, pleads ill health as an excuse for failure personally to attend the hearing, and causes the entry of a general appearance on his behalf by his chosen counsel. This is certainly an effective waiver of any right which the taxpayer might have had to be personally present at the hearing of the petition.

Furthermore it is contended that the district court is limited by § 7604(b) to the issuance of an enforcement order merely requiring compliance with the precise terms of the original summons issued by the Internal Revenue Service under § 7602 which the petition charged the taxpayer with ignoring; instead of which, so the argument runs, the district court improperly issued an order broader in scope than the original summons, calling, for example, for continuing performance by the taxpayer in the submission of weekly statements of his expenditures "until further notice". The propriety of the court's order of January 10, 1956, in modifying and enlarging the terms of the original summons issued under § 7602, seems to raise an issue of first impression, but we have little difficulty in concluding that the court's order was lawful in this respect.

In the first place we do not read § 7604(b) as narrowly as appellant asks us to do. The power of the enforcing court is stated in broad terms as a power "to make such order as he shall deem proper" to enforce obedience to the requirements of the summons. In the situation presented to the district court in this case, we do not think the court should be powerless to promulgate an order, on request of the Revenue Service, embodying a reasonable modification of the original summons. No doubt the demand upon Brody

in the order of January 10 was a reasonable one, as even his own lawyer conceded at the time. The court clearly had power to request periodical reports from the taxpayer, and the information called for was certainly "essential to any thorough tax investigation". See *United States* v. *United Distillers Products Corp.*, 156 F.2d 872, 874 (C.A. 2d, 1946). In addition to the support which § 7604(b) gives to the order of January 10, the general grant of jurisdiction contained in § 7402 of the Code independently supplies ample authority for the order. (Section 7402 is set forth *supra* in note 2.) It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws. That the Revenue Service never purported to act under § 7402 in issuing its original summons to the taxpayer or in filing its petition with the district court is entirely irrelevant to the district court's jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 302 (1947); see also *United States* v. *Weisenbloom*, 168 F.2d 698 (C.A. 2d, 1948).

The other points urged as grounds for reversal boil down to the proposition that Brody was justified in not responding to the questions contained in the order of January 10, first, because of the condition of his health, and, second, because of the Fifth Amendment.

In dealing with the first of these alleged justifications, the district court distinguished sharply between Brody's physical ability to appear in court and his physical ability to consult with his advisers and to formulate his answers in writing to the inquiries contained in the order. Appellant's health was certainly not too good, and the district court specifically reserved the question whether or not Brody could have appeared in court earlier than he did, although the findings disclose severe doubts about Brody's

sincerity in this respect.[4] But the court did state that it was "satisfied beyond a reasonable doubt" that at least for extensive periods Brody could have obeyed the order to submit to the Revenue Service written answers to the questions propounded, and could have done so without danger to his health. Upon an examination of the entire record, we are not disposed to disagree with this basic finding. Indeed a contrary ruling would be in disregard of the clear import of the evidence, which was without contradiction, that, during the period when Brody was supposed to have been physically incapacitated in Florida, he was confined to the house only a little more than half of the time; was driving a car himself; was conducting daily conferences with his counsel about tax matters as early as January, 1956, and throughout the year engaging in other conferences. In short, the record furnishes ample grounds for the finding of the district court that appellant was not in such poor state of health as to render him incapable of responding to the command of the court.

---

[4] The district court's views on this issue are as follows:

"This hearing is not for contempt for failure to respect that original summons. There is no question but that respondent's health was not good, and as a result of medical opinion, following examination, I did not order him to appear. I do not pass on whether physically he could, or could not, have appeared in court earlier than he did, and the present proceeding relates solely to his failure to obey the orders which I issued in lieu of compelling his earlier attendance in person. I might add, however, that the evidence introduced by Brody on January 4 left me with the strong impression that his failure to respond originally to the Collector's summons not only was not medically justifiable, but was not genuinely believed by him to be. He did not even seek express medical opinion to that effect from his regular physician. Instead, he simply made the doctor a visit, perhaps so that there would be a record, and then instructed counsel to say the doctor told him not to attend. When the Collection Officer, temporarily, took counsel's medically unsupported statement, Brody left, unannounced to the Officer, for Florida, from which distance he could more readily claim his health would not permit him to appear when his attendance was again sought." (Note 2 to Judge Aldrich's opinion, not included in 147 F. Supp.)

The Fifth Amendment excuse remains to be considered.

At the outset it is to be noted that Brody was not convicted of contempt in the presence of the court. The order of January 10 required him to do something away from the court, that is, to supply certain information to the Internal Revenue Service. The contempt, if there was one, must have taken place shortly after Brody received notice of the January 10 order and, having an opportunity to do so, chose not to comply with it. When Brody came to trial upon the charge of criminal contempt on December 11, 1956, the issue to be decided was whether Brody had already irretrievably committed a contempt of court by disobedience of the court's order of January 10 at some time on or before the date on which the United States Attorney had filed his petition for attachment for criminal contempt.

Some light may be thrown upon the case at bar by consideration of the situation which was presented in *Carlson* v. *United States*, 209 F.2d 209 (C.A. 1st, 1954). There, Carlson had refused to answer certain questions before the grand jury on the ground of the Fifth Amendment privilege. That was not an independent crime, nor was it a contempt of court under 18 U.S.C. § 401, even if the privilege had been erroneously invoked. The grand jury thereafter filed a "presentment" against Carlson, in which the assistance of the court was asked in order to compel him to answer. Before ordering Carlson to go back to the grand jury and answer the questions, the court had necessarily to rule, after a full hearing, on the availability of the privilege against self-incrimination as asserted by Carlson. If the court after a hearing had ruled against the privilege and had ordered Carlson back to the grand jury, with direction to answer the questions, then Carlson would have had a choice to make: (1) He might have elected to obey the court order, or (2) he might have elected to disobey the

court order, thus inviting a risk of being found in criminal contempt. He would have had to take his chances on being able to convince an appellate court that the district court committed reversible error in ruling that the privilege against self-incrimination was not properly invoked under the circumstances. But if he should have thus succeeded in this court, or ultimately on review by the Supreme Court, then the district court judgment of conviction for criminal contempt would have had to be vacated because of the appellate determination that respondent did not disobey a "lawful" order of the district court within the meaning of 18 U.S.C. § 401(3). *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Maffie* v. *United States*, 209 F.2d 225, 226 (C.A. 1st, 1954). But it seems pretty clear that, if Carlson had made an unexplained refusal to answer the questions put to him in the grand jury room, and had not asserted a privilege against self-incrimination in the ensuing presentment proceeding before the district court, that would have constituted a waiver of the privilege. The court was under no duty to raise the question of privilege *sua sponte;* the privilege must be affirmatively claimed by the witness. *United States* v. *Murdock*, 284 U.S. 141 (1931). And if the court in the presentment proceeding, having no issue before it respecting the privilege, directs the respondent to go back to the grand jury and give answer to specified relevant questions, it would seem that respondent would be in criminal contempt for refusal to obey such court order; and upon a hearing on an order to show cause why he should not be adjudged in criminal contempt, it would be too late to plead the privilege as a defense.

The situation presented in the case now before us is not dissimilar to that found in the *Carlson* case. Here, Brody's failure to respond to the summons issued by the Internal Revenue Service under § 7602 may have been independently criminal, under 26 U.S.C. § 7210, but it was not a contempt

in the presence of the court within the meaning of 18 U.S.C. § 401(1). The court petition filed by the Internal Revenue Service under 26 U.S.C. § 7604(b) was like the presentment filed by the grand jury in the *Carlson* case. It was an application to the court for assistance in the current tax investigation by means of a court order directing Brody to furnish information to the Internal Revenue Service. Brody filed an answer to that petition under § 7604(b), but in such answer he asserted no privilege against self-incrimination; nor indeed had he ever asserted before the Internal Revenue Service that he had disregarded its summons because the disclosures called for would have violated his privilege against self-incrimination.

It is true that Brody was not personally present at the hearing on the petition of the Internal Revenue Service under § 7604(b). But of course he was subject to the jurisdiction of the court by virtue of having directed his attorney to enter a general appearance on his behalf. And when the court had before it the question whether to issue the order drafted and proposed by the Internal Revenue Service, Brody's attorney certainly could have objected that an order in the proposed terms would violate Brody's privilege against self-incrimination.[5] Instead of that, coun-

---

[5] There appears to be some confusion concerning the power of a duly authorized attorney to claim the privilege against self-incrimination on behalf of his client in view of statements in two cases in other circuits that, because the privilege is a personal one, it cannot be asserted by a third party, not even by an attorney. See *Ziegler* v. *United States*, 174 F.2d 439, 447 (C.A. 9th, 1949); *United States* v. *Johnson*, 76 F. Supp. 538, 540 (D.C. Pa. 1947). But the authorities cited in these two cases are clearly distinguishable. They either held or said merely that, when a witness is asked to respond to a lawful question, he cannot refuse to answer by setting up "the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial." *McAlister* v. *Henkel*, 201 U.S. 90, 91 (1906). See also *Hale* v. *Henkel*, 201 U.S. 43 (1906); *London* v. *Everett H. Dunbar Corp.*, 179 Fed. 506 (C.A. 1st, 1910); *In re*

sel for Brody conceded at the time that the terms of the proposed order were reasonable.

There being no issue of self-incrimination before the court at the time, the court proceeded to issue its order of January 10, 1956, in the terms requested by the Internal Revenue Service. It may well be that, after the court issued its order of January 10, it was too late for Brody to assert a privilege against self-incrimination, at least on grounds in existence on the date of the court's order. If this is so, then affirmance of the judgment of conviction for criminal contempt is inescapable. The analogy to the situation in the *Carlson* case is certainly striking. It is only by a latitudinarian though now well-established interpretation of the words of the Fifth Amendment, "nor shall [any person] be compelled in any criminal case to be a witness against himself," that the privilege might have been available at all to Brody in the case at bar. This is not a situation where he was being compelled to testify against himself in a criminal case, nor even where disclosures exacted of him elsewhere were sought to be presented as evidence against him in a criminal case.

However, in the absence of precedents squarely in point, we prefer not to rest our affirmance on the foregoing ground. We shall assume, in Brody's favor, that Brody, or his attorney, could sit tight while the court was framing its enforcement order under § 7604(b) without suggesting a possible question as to the privilege against self-incrimination, and then assert the privilege at a later point as an excuse for noncompliance with the court's order.

Making that assumption, when and how would Brody have to assert his privilege against self-incrimination as

Knickerbocker Steamboat Co., 136 Fed. 956 (D.C.S.D.N.Y. 1905). This is quite different from a holding that a properly authorized agent of an individual, including his attorney, is powerless to assert the privilege for his principal in appropriate circumstances. The Supreme Court has never so held, nor have we.

an excuse for not answering the questions propounded in the court's order? It might be a salutary rule if respondent were required to declare his claim of privilege fairly early after his determination not to respond to the questions, by some form of communication, either to the Internal Revenue Service or to the court, stating that he must decline to furnish the information requested by the order of January 10 because of a fear of self-incrimination. That would put the government on notice of respondent's claimed reason for noncompliance, and would afford the United States Attorney an opportunity to give consideration to this asserted defense before instituting a proceeding for criminal contempt.

Again, however, we make an assumption in Brody's favor, that he could simply ignore the court's order of January 10, and do nothing else, and assert his Fifth Amendment defense if and when he might be haled into court on a charge of criminal contempt.

If the foregoing is so, then surely the proper time to have claimed the defense of privilege was when Brody filed his answer on June 21, 1956, to the court's order to show cause why he should not be adjudged in criminal contempt. But, as we have seen, his answer made no illusion to the Fifth Amendment, and merely explained that he had not meant to be contemptuous of the court, that he was simply denying to the Internal Revenue Service the requested information so as to be in a better bargaining position to negotiate a compromise of his tax liabilities. The pleadings having raised no issue of privilege, the district court would have been justified in adjudging Brody guilty of contempt without reference to that excuse. But the court declined to be technical about the matter and, after having first adjudged Brody guilty, it entered an order reopening the contempt proceeding for the purpose of allowing the presentation of evidence on the issue of self-incrimination. Since the

district court thus considered the issue of self-incrimination, we may take it, in the present posture of the case, as though the district court had informally permitted an amendment of Brody's answer to the show cause order, and as though Brody had set up the defense of privilege in an amended answer.

But if, as we have assumed, it was not too late to raise an issue of the Fifth Amendment in the proceeding for criminal contempt, just what, more precisely, was the content of such issue which Brody properly could raise at that point? Supposing, as we have, that Brody need not have claimed his privilege in the civil enforcement proceeding under § 7604(b), and that he need not have claimed his privilege by some form of communication either to the Internal Revenue Service or to the court promptly after deciding not to obey the court order of January 10, then the very least Brody would have had to show, at the trial on a charge of criminal contempt, was that he had failed to obey the court order of January 10 *because of* the Fifth Amendment privilege; that is, because of a genuine apprehension that true answers to the questions propounded to him might involve him in self-incrimination.

On this narrowed issue, the district court's adverse findings are supported by overwhelming evidence. It seems to be a fact that, shortly after the issuance of the order of January 10, Brody stated to his counsel, in Florida, that he did not want to comply with it, and in the ensuing discussions it seems that they gave some consideration to a possible claim under the Fifth Amendment. However, the district court found that Brody reached the affirmative decision not to assert a privilege against self-incrimination, as a matter of tactics, "for substantive, not for procedural reasons." The court found that Brody's disregard of the January 10 order "was substantial and flagrant, deliberately and contemptuously persisted in; that there was no

physical inability; that no aspect of possible self-incrimination was genuinely apprehended, and that it was affirmatively decided to forgo the claim." The court found that Brody's real reason for disobedience of the order was as stated in his answer to the order to show cause why he should not be adjudged in contempt: "He attempted merely, in his difficult situation, to improve his position for negotiating a settlement of the claimed tax liability." In corroboration of these findings, which were amply supported by the evidence, the district court pointed out: "In conformity with this I-have-nothing-to-hide policy he authorized Mr. Gottlieb to admit in the answer filed January 28, 1956 to the Duffy petition [the enforcement petition filed by the Internal Revenue Service pursuant to § 7604(b)] the very facts which he now claims it would incriminate him to elaborate upon."

A judgment will be entered affirming the judgment of the District Court.

FILED
MAY 29 1957
JOHN T. FEY, Clerk

No. 1039

United States Court of Appeals
For the First Circuit

No. 5207

SAMUEL C. BRODY,
RESPONDENT, APPELLANT,

v.

UNITED STATES OF AMERICA,
PETITIONER, APPELLEE;

No. 5209.

SAME v. SAME.

RECORD APPENDIX TO CONSOLIDATED BRIEF FOR THE APPELLEE

Judges Blackstock Printing Company, Boston, Mass.—5/29/57—100

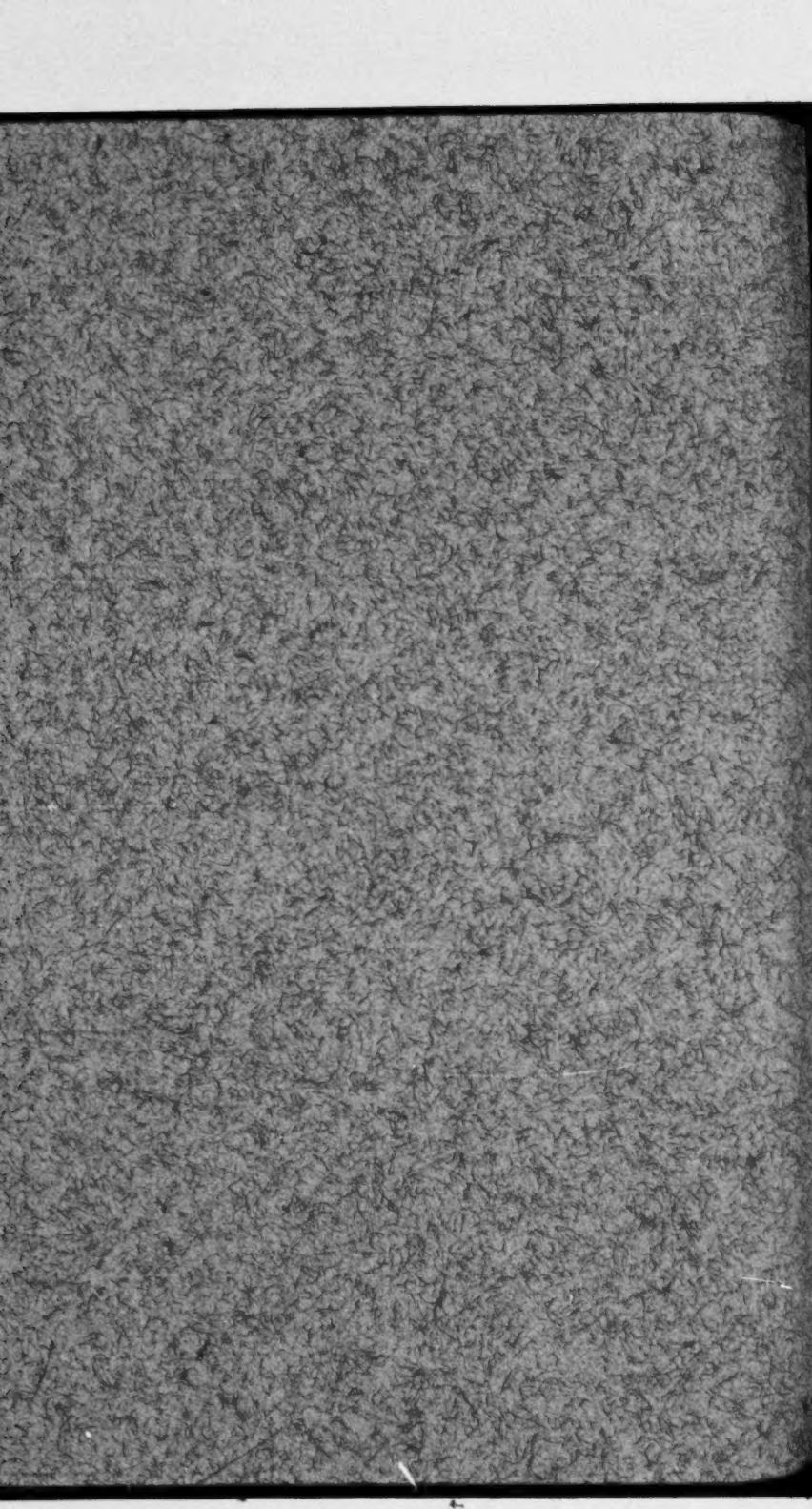

TABLE OF CONTENTS

	Page
Docket Entries (Docket 55-67-A)	183
Statement of Arthur Gottleib	187
Petition for Attachment as for Contempt (Docket 55-67-A)	190
Order to Show Cause on Petition (Docket 55-67-A)	194
Hearing, January 9, 1956	195
Hearing, January 10, 1956	199
Order, January 10, 1956 (Docket 55-67-A)	202
Order, July 12, 1956 (Docket 55-67-A)	204
Hearing, December 27, 1956	205
Stenographic Record of Trial:	216
Closing Argument by Harold C. Jackson, Esq.	217
Closing Argument by Andrew A. Caffrey, Esq.	228

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the Emergency Business Docket, in the cause entitled:

Emergency Business Docket
Action No. 55-67-A EBD
JOHN J. DUFFY, Acting Group Supervisor,
Delinquent Accounts and Returns Branch,
Internal Revenue Service
v.
SAMUEL C. BRODY

1955

Dec. 29 Petition for attachment as for contempt, filed.

29 ALDRICH, J. Order to show cause on petition for attachment for contempt to issue.

29 Order to show cause issued; returnable Monday January 9, 1956 at 3 o'clock p.m.

1956

Jan. 9 Marshal's return of order to show cause and Petition for attachment for contempt, ret'd without service after diligent search, filed.

9 ALDRICH, J. Hearing on return of order to show cause on petition for attachment for contempt; continued to Jan. 10, 1956, 12m.

10 ALDRICH, J. Appearance of Arthur Gottlieb, Esquire, for respondent filed in open court; hearing continues; order to be submitted by U. S. Atty. (FJD).

10 ALDRICH, J. ORDERED, ADJUDGED AND DECREED that respondent submit to officer of Internal Revenue Service at Boston, within 7 days after entry of this ORDER, a written statement under oath

1956

of information re expenditures and disposition of proceeds, etc. (outlined in Order).

19 ALDRICH, J. Hearing re Order of Jan. 10, 1956; continued.

28 Respondent's answer filed.

31 ALDRICH, J. Hearing on petitioner's request for further medical examination; respondent ordered to submit to a second examination.

Feb. 23 ALDRICH, J. Hearing.

July 6 ALDRICH, J. Hearing; Joseph M. Lynch sworn and testified; briefs July 10, 1956 on power of Court to enter order of Jan. 10, 1956.

12 ALDRICH, J. Findings dictated; case continued without day. Order entered. Copies to counsel.

Aug. 23 Reporter's transcript of proceedings (Memo of Court) July 12, 1956, filed.

31 Appearance of Andrew A. Caffrey for petitioner filed.

Dec. 7 Court Reporter's transcript of hearing Jan. 19, 1956 filed.

10 Court Reporter's transcript of hearing Jan. 31, 1956 filed.

27 ALDRICH, J. OPINION filed. Respondent adjudged in contempt; copies to counsel.

27 ALDRICH, J. Respondent's counsel's (Gottlieb) oral motion to reopen, allowed after hearing; Jan. 4, 1957 at 10 a.m. for further evidence.

28 ALDRICH, J. MEMORANDUM filed: Reopening is for all purposes, including taking of any proper evidence any party wishes to offer on subject whether response to orders of Court might have involved incrimination. If, in light of above either party wishes later date than Jan. 4, request may be made.

1957

Jan. 4 ALDRICH, J. Hearing on contempt resumed; evidence; appearance of Harold G. Jackson, Esquire for respondent, filed; evidence.

7 ALDRICH, J. Arguments; cont. to Jan. 11, 1957 at 9:45 a.m.

11 ALDRICH, J. OPINION filed; defendant is adjudged in contempt for failure to respond to Order of Court January 10, 1956. Copies distributed by Court; copies to West Pub. and CCH.

11 ALDRICH, J. ORDER entered: "Following a reopening of the hearing the opinion dated December 27, 1956 is withdrawn and the opinion dated January 11, 1957 substituted therefor." Copies distributed by Court.

11 ALDRICH, J. Defendant sentenced to be imprisoned in No. 56-29-A EBD for one (1) year, said sentence to commence Wednesday, Jan. 16, 1957 at 12m. unless before that time a notice of appeal shall have been filed.

11 Judgment and Commitment entered only in companion case No. 56-29-A EBD.

11 Notice of appeal filed by the defendant.

16 Copy of n/a del'd to Andrew A. Caffrey, Asst. U.S. Att'y; U.S. Court of Appeals and mailed to Harold G. Jackson, Esq. 68 Devonshire St., Boston.

19 Appearance of James D. St. Clair for respondent filed.

21 Notice of appeal filed by the defendant. Copy of n/a mailed to Andrew A. Caffrey, Asst. U.S. Att'y, Harold G. Jackson, Esq., 68 Devonshire St., Boston & delivered to the USCA with attested docket entries.

1957

24 Stenographic records of trial on January 4, 7, & 11, 1957, filed. (3 vols.)

28 Original papers for records on appeal delivered to the U.S. Court of Appeals.

Feb. 21 Mandate from the U. S. Court of Appeals received & filed.

It was here ordered that the appeal herein be, and the same hereby is, dismissed without prejudice.

Mar. 11 Court Reporter's transcript of Hearing Jan. 9, 1956 filed.

12 Appearance of Geo. H. Lewald, Esq. for Petitioner, filed.

12 Court Reporter's transcript of Hearing Jan. 10, 1956, filed.

14 Clerk's Supplemental Certificate filed.

In Testimony Whereof, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, said District this .... day of ..... 1957.

John A. Canavan
Clerk

By: (s) Dorothy C. Clark
Deputy Clerk

STATEMENT OF ARTHUR GOTTLIEB

209 Washington Street
Boston, Massachusetts
made
December 14, 1955, at 10:00 A.M., in Office of
Regional Counsel, 55 Tremont Street, Boston, Mass.,
in the presence of:

Joseph Landis, Attorney, Office of Regional Counsel
Myles McCabe, Collection Officer, Office of District Director
Mrs. Geneva O. Cooper, Government Reporter
In re: Samuel C. Brody
10 Crosby Road
Newton, Massachusetts
Docket No. 37262

Mr. Gottlieb: I am here representing Samuel C. Brody in response to a summons served upon him by Myles McCabe, in the Cleveland Circle Branch of the National Shawmut Bank. The summons is signed by John J. Duffy. It is returnable on the 16th day of December, 1955, 10:00 o'clock, to Room 419, 55 Tremont Street, Boston, Massachusetts. I communicated with Mr. McCabe before that date and arranged for the hearing on the summons to be advanced to December 14, 1955, at 10 o'clock at the same address, and I am appearing in behalf of the taxpayer at the time and place of the advanced hearing.

Mr. Landis: May I interject. Did you notify the taxpayer that the return date had been advanced to December 14, 1955?

Mr. Gottlieb: I did. Now, I showed the summons . . . I discussed the summons with the taxpayer and he told me that he could not appear on the date specified in the summons or on the date advanced for the reason that he was physically incapacitated. I advised him that if he felt he couldn't appear here in response to the summons because of his physical incapacity, that he need not appear.

(Off the record discussion)

Mr. Gottlieb: The taxpayer has represented to me that because of his heart condition he rises between 11:00 and 12:00 in the morning and does not leave his home as a rule until 12:30 P.M.

Mr. Landis: Mr. Gottlieb, if we adjourned this hearing until the afternoon so that the taxpayer has had his full quota of rest in the morning, would he be able to physically appear here this afternoon?

Mr. Gottlieb: No.

Q. Is he bedridden? Is the witness bedridden? A. No.

Q. He is physically able to walk; go outside of his home? A. Yes.

Q. Transact matters of business to some extent? A. Yes.

Q. This is from your knowledge of what he has told you and you have observed? A. From my observation, not from what he has told me. But I should like to add that any business involving excitement or worry effects his condition and he has attempted to avoid such excitement and worry. His doctors have advised him to avoid such excitement and worry and he has specifically been advised to avoid a hearing or a trial, such as is entailed in response to a summons of this kind.

(At this point Mr. Frank V. Moran entered the conference room.)

Mr. McCabe: When, in your opinion, do you think he will be physically able to appear?

Mr. Gottlieb: On October 12, 1955, in behalf of the taxpayer, I submitted to Chief Judge Murdock, in the U. S. Tax Court, an affidavit—several affidavits, two of which related to the taxpayer's physical condition. The taxpayer's condition, he informs me, has not changed since that time. At that time it was the doctor's opinion that if Samuel Brody could avoid the excitement and agitation of court proceedings for about one year, he possibly would be in a position to withstand the excitement of a hearing or trial.

I adopt the opinion of the doctor, in response to Mr. McCabe's question.

Mr. McCabe: Then it is your opinion that perhaps he would not be able to appear until in and about October 1956?

Mr. Gottlieb: Yes.

Mr. Landis: Mr. Gottlieb, I should like to state that I am very desirous that this particular proceeding—that is, the taking of the testimony of Samuel C. Brody under oath relating to his tax liability, which is the subject of the summons before us, take place today lest we have to resort to further procedures under the law to enforce the summons. Being mindful of the physical condition of the witness, I am sure that Mr. McCabe will proceed in a manner that will not cause him undue agitation. This is not an adversary proceeding. It is merely interrogation. We could have the hearing, taking time for rest for the witness, if it becomes necessary. We, for our part, would cooperate to the fullest to avoid any undue physical effects to the witness. With that in mind, would you be agreeable to contacting him and the doctors, if necessary, and see if we might proceed with this questioning this afternoon?

Mr. Gottlieb: This is a matter for his doctors to determine. I am agreeable to go—to start immediately with this hearing. I will communicate with him and possibly his doctors and report to you.

Q. You understand that at the moment he is in default of response to the subpoena. He was duly served and you have stated from your observations that he was not physically incapacitated from appearing. He has not done that. A. It was not my interpretation that he is in default of his summons—of this summons. He is not appearing because of his physical condition and upon advice of doctors. I do not consider the test of whether he is bedridden to be the only one.

Q. That, of course, will be a matter for the court to decide.

Mr. McCabe: Are you aware that during the month of November 1955 that Mr. Brody has been active in business generally and has even spent one day or possibly more out of town?

Mr. Gottlieb: I am not aware of Mr. Brody's activities excepting what he has told me and he has not discussed his activities that you have just mentioned. He has told me about his inactivities.

Mr. Landis: I think there is nothing further to be served by continuing this discussion. If you will proceed as you said you would and contact me by telephone to let me know whether he will appear this afternoon in response to the summons, we will then see what further steps will be taken. Is that agreeable?

Mr. Gottlieb: Yes.

(Conference adjourned at 10:17 A.M., December 14, 1955.)

PETITION FOR ATTACHMENT AS FOR CONTEMPT.

E.B.D. No. 55-67-A

Your petitioner, by his attorney, the United States Attorney in and for the District of Massachusetts, respectfully represents:

1. This petition is brought under the provisions of Section 7604 of the Internal Revenue Code of 1954, 68A Stat. 902.

2. Your petitioner is an Acting Group Supervisor, Delinquent Accounts and Returns Branch, Internal Revenue Service, and, as such, has been duly authorized, under the provisions of Section 7602 of the Internal Revenue Code of 1954, 68A Stat. 901, to make examinations of tax returns; to examine any books, papers, records or other data relative to tax returns or collection of delinquent taxes; and to summon any person he may deem proper to produce

books, papers, records or other data and to give testimony, under oath, as may be relative or material to his investigation.

3. The respondent is a resident of Newton, Massachusetts. His present address is 10 Crosby Road, Newton, Massachusetts.

4. The respondent is presently indebted to the United States of America for income taxes, and penalties and interest thereon, amounting to $663,629.31, plus additional unassessed interest to date of payment, which amount has been duly and timely assessed against him as provided by law.

5. On November 4, 1955, Collection Officer Myles P. McCabe and Group Supervisor Bernard F. Smith made demand on the respondent for payment of said taxes, as provided by law.

6. As the result of sales of securities, the respondent received checks drawn by H. C. Wainright & Co., Boston, endorsed said checks and cashed them, all as indicated below:

Date Check Drawn	*Drawee*	*Amount*	*Date Check Cashed*
11/9/55	Boston Safe Deposit & Trust Co.	$ 2,600.00	11/9/55
11/9/55	National Shawmut Bank	10,950.00	11/9/55
11/10/55	" " "	26,800.00	11/10/55
11/10/55	" " "	44,000.00	11/10/55
11/11/55	" " "	37,400.00	11/14/55
11/14/55	" " "	80,000.00	11/14/55
11/15/55	" " "	47,500.00	11/15/55
11/17/55	" " "	31,500.00	11/17/55
11/25/55	Boston Safe Deposit & Trust Co.	3,620.27	11/25/55
11/29/55	Second National Bank-State Street Trust	48,105.59	11/29/55

7. On December 6, 1955, at approximately 11:10 A.M., pursuant to his duties and authorization aforesaid, your petitioner caused to be served upon the respondent a summons to appear and testify on December 16, 1955. A copy of said summons, marked "A", is attached hereto and made a part hereof. Said summons was served, by delivering the original thereof to the respondent in hand, by Collection Officer Myles P. McCabe.

8. On December 8, 1955, Arthur Gottlieb, Esquire, Attorney for the Respondent, requested that the appearance date indicated on said summons be advanced to December 14, 1955. Said request was granted.

9. On December 14, 1955, the said Arthur Gottlieb, Esquire, appeared alone and stated that the respondent could not appear for the reason that he was physically incapacitated and that he had advised the respondent that he need not appear if physically unable to do so.

10. On December 15, 1955, the respondent left this jurisdiction destined for the State of Florida.

11. Notwithstanding service of said summons as described above, the respondent refused and neglected to comply with said summons by failing to appear personally before the said Myles P. McCabe on either December 14, 1955, or December 16, 1955.

WHEREFORE, your petitioner respectfully prays:

1. That this Court issue an order to the respondent to show cause why his person should not be attached as for contempt.

2. That this Court issue an order against the respondent attaching his person as for contempt.

3. That this Court issue an order to the respondent to show cause why he should not be ordered to appear and testify as directed by the summons on a date fixed by this Court.

4. That this Court issue an order directing the re-

spondent to appear and testify as directed by the summons on a date fixed by this Court.

5. For such other order or relief as this Court may deem just and proper.

ANTHONY JULIAN
United States Attorney
By: (s) FRANCIS J. DIMENTO
FRANCIS J. DIMENTO
Assistant U. S. Attorney
Attorney for the Petitioner

AFFIDAVITS IN SUPPORT OF PETITION

I, Myles P. McCabe, being duly sworn, depose and say that I am a Collection Officer of the Internal Revenue Service, that I have read the above petition and that its contents are true to the best of my knowledge and belief.

(s) MYLES P. McCABE
MYLES P. McCABE
Collection Officer
Internal Revenue Service

Subscribed and sworn to this 27th day of December, 1955, before me,

(s) FRANCIS J. DIMENTO
Notary Public

My commission expires November 28, 1958.

I, John J. Duffy, being duly sworn, depose and say that I am an Acting Group Supervisor of the Internal Revenue Service, that I have read the above petition and that its contents are true to the best of my knowledge and belief.

(s) JOHN J. DUFFY
JOHN J. DUFFY
Acting Group Supervisor
Internal Revenue Service

Subscribed and sworn to this 27th day of December, 1955, before me,

(s) FRANCIS J. DIMENTO
Notary Public

My commission expires November 28, 1958.

ORDER TO SHOW CAUSE ON PETITION.
E.B.D. No. 55-67-A

Upon reading and considering the petition of John J. Duffy, duly verified on the 27th day of December, 1955, by the said John J. Duffy, Acting Group Supervisor, Internal Revenue Service, and Myles P. McCabe, Collection Officer, Internal Revenue Service, and it appearing to the satisfaction of the Court that the respondent, Samuel C. Brody, after being duly and regularly summoned to appear before the said Myles P. McCabe failed to appear in response thereto on December 14, 1955 or December 16, 1955, to testify as to the collection of his tax liability; and it appearing that the said Samuel C. Brody is at the present time indebted to the United States for taxes duly assessed against him; and it appearing that the said respondent should appear and show cause why he refused and failed to obey said summons; it is, therefore, by the Court

ORDERED, ADJUDGED and DECREED that the respondent Samuel C. Brody, be directed to appear before ALDRICH, J., U. S. District Court, District of Massachusetts, on the ninth day of January, 1956, at 3:00 o'clock P.M. and then and there show cause, if any, as to why his person should not be attached as for contempt.

It is further ORDERED that a certified copy of the petition and of this order be served upon the respondent, Samuel C. Brody, by the United States Marshal within six days after the date hereof and that such service shall be deemed sufficient for due notice.

(s) ALDRICH
12/29/55 *United States District Judge*

HEARING.

Court Room No. 2
Federal Building, Boston
Monday, January 9, 1956
3:00 p.m.

[2] The Clerk: E.B. 55-67, Duffy versus Brody.

Mr. DiMento: As your Honor knows, this is an order to show cause on a petition for attachment as for contempt, under the 1954 Internal Revenue Code. The respondent in the petition is charged with failing to obey a subpoena or a summons of an agent of the Internal Revenue Service. I don't believe the respondent is here, but his attorney is here, Mr. Gottlieb.

Mr. Gottlieb: As we already stated, last Friday evening, if your Honor please, Mr. Brody stated to me that he was physically unable to appear. He also said he had received affidavits from two of his doctors in Boston in October of last year to the effect that it might be disastrous for him to appear at a tax court hearing.

I also received word on that day, on December 14th, that his condition had not been improved, and that it would be dangerous for him to appear.

The Court: From whom did you receive word on December 14th?

Mr. Gottlieb: From Mr. Brody, who communicated the information of the doctor. Mr. Brody represented to me that he had seen Doctor Spitz, and later Doctor Kramer. They were the same doctors who had filed the affidavit in connection with the tax court hearing in October.

The Court: You did not communicate directly with the doctors at that time?

[3] Mr. Gottlieb: I did not.

The Court: And you did not receive any further affidavits from them, but only Mr. Brody's own word?

Mr. Gottlieb: Yes. On that basis I went to the hearing

on the 14th. I told the man that Mr. Brody claimed he was physically unable to appear at the hearing. I also told them if Mr. Brody were physically unable to appear at the hearing he was excused from being there. The regional counsel asked whether or not Mr. Brody was bed ridden. I said I didn't think that that should be the test, it was too limited a test, that the man had an angina and coronary thrombosis and that he might very well be active and yet be entirely incapacitated to attend a hearing. At that time the Regional counsel expressed his dissatisfaction and he said he was going on with contempt proceedings.

I immediately wrote to Mr. DiMento at that time and asked him in case there is an application to be heard—

The Court: You asked him what?

Mr. Gottlieb: Asking to be heard on an application for attachment as of contempt.

The Court: There has not been any attachment filed, at that time.

Mr. Gottlieb: No, but I asked him for an opportunity to be heard.

The Court: Well, now, if I recall correctly, you told me last Friday in chambers—rather, Mr. DiMento told me on the [4] 15th of December, Mr. Brody went to Florida.

Mr. Gottlieb: That is true.

The Court: And that you knew on the 14th he was going to go to Florida but did not tell the authorities.

Mr. Gottlieb: That is so.

The Court: Go ahead.

Mr. Gottlieb: That is so. When I learned from Mr. Brody shortly after, he was served with the summons to appear in the Comptroller's office, he had already made arrangements to go to Florida and he was leaving on the 15th. The summons to appear invited him to an earlier hearing. So I thought it was the right thing, at least, to advise the hearing while Mr. Brody was here, but I didn't

think I had to tell them he was leaving on the 15th because so far as I knew he was going down there because of his health. It was merely a sojourn. He was not leaving the district. That feeling has been confirmed by his being in touch with me ever since. I know where he is. I know his address. I don't think that his being down there, just his position, so far as I can see, is too important. Furthermore, I have no knowledge of whether he was to go down or not.

The Court: We are not trying you at this moment.

Mr. Gottlieb: I don't hear.

The Court: We are not trying you at all. I just want to get the facts of the record with relation to Mr. Brody.

Mr. Gottlieb: When an attorney is too close to a [5] client, there is a sensitivity in the way the attorney feels.

The Court: I am not passing on that, because it isn't before me. I am interested in Mr. Brody.

Mr. Gottlieb: Yes.

The Court: Has he authorized you to enter an appearance for him here?

Mr. Gottlieb: I feel authorized to enter an appearance. I have represented him right along. I feel I can represent him here.

The Court: I don't want you to do anything you should not. I call your attention to the fact that at the present moment there is no service on Mr. Brody in this proceeding.

Mr. DiMento: Isn't there service at his residence, your Honor, which is at Crosby Road, in Newton. I believe he is still a resident there, as well as having a domicile in Newton. I have received no notice of this, your Honor.

The Court: I just received it a few moments ago.

Mr. DiMento: I was under the impression it had been served. I will advise the marshal that service can be made by leaving a copy of this at his house, the last place of

address, which is still his residence and his domicile, as far as I know.

The Court: I suspect before I order him in contempt, that would have to be done, because of what Mr. Gottlieb tells me, he is only seeking by inference—I would not want any man in contempt by virtue of an appearance of counsel, that was not [6] specifically for that purpose.

Mr. Gottlieb: I am still ready to file an appearance.

The Court: I appreciate that, Mr. Gottlieb, I just do not know whether that would be fair to Mr. Brody.

Mr. DiMento: I think service may be accomplished today, as a matter of fact.

The Court: All right. We are faced with the fact as well as the theory, and the fact is Mr. Brody is in Florida. What relief you are going to ask me for, Mr. DiMento, I will await the receipt of actual service, so the matter is fully before me.

I am entirely unsatisfied with the record, that a man should authorize counsel to make his excuses for not appearing, based on certificates filed with relation to quite a different matter some seven or eight weeks before. My attitude on this thing is not at all a happy one. I will continue this case.

Mr. Gottlieb: I think your Honor said last Friday you were going to wait an examination, a medical examination, at the proper opportunity.

The Court: I said last Friday I contemplated entering an injunction forthwith, if the Government asked for it. I am in no position to enter anything today, on the present state of the record. Neither has the Government asked for anything. When would you like to have it, 4 o'clock tomorrow?

Mr. DiMento: I think service can be accomplished by [7] that time.

The Court: If not, we will continue it further. Better

yet, 12 o'clock tomorrow, if you think service can be accomplished, because I shall have nothing on tomorrow between 12 and 1.

Mr. DiMento: Thank you.

[Adjourned.]

HEARING.

Court Room No. 2
Federal Building, Boston
Tuesday, Jan. 10, 1956
1:10 p.m.

[2] The Clerk: Emergency Business No. 55-67, John J. Duffy versus Samuel C. Brody.

Mr. Gottlieb: If your Honor please, I spoke with my client yesterday afternoon, and he authorized me to file a general appearance for him in this petition.

The Court: That's fine. I think that is very much happier all around.

Mr. Gottlieb: And I would like to file that [handing to Clerk].

Mr. DiMento: Your Honor, if you remember, we were to have a physical examination of Mr. Brody to determine whether he could make the trip to Boston.

The Court: Yes.

Mr. DiMento: And, as I told your Honor before, this is somewhat of an emergency matter because the Government is interested in seeing these funds are not dissipated in the meantime.

The Court: Yes.

Mr. DiMento: And time becomes of the essence. We considered the possibility of requesting this Court to issue an injunction forbidding Mr. Brody to dispose of his assets but we thought we would run into practical difficulties because the man had to live, he's got living expenses, and even if an order were entered we really couldn't know

whether the money that might eventually be missing was spent before or after the issuing of the order.

[3] So, I have here a proposed order, which is not in final form, but which I can get in final form today, which orders the respondent to state the date, amount, and nature of every expenditure by him in excess of $500 since November 4, 1955. November 4 was the first date on which he cashed the checks which prompted these petitions; and also ordering him to state under oath the disposition of proceeds of those checks, and ordering him to state the present whereabouts of such proceeds if not disposed of, and ordering him to state under oath, make a statement under oath of all his assets, whether held by him or others for him, of every kind and nature, and their present location. That is the gist of the order. I think the Court has that power.

The Court: Where would you propose to have him do this? In writing?

Mr. DiMento: In writing; and submit it to the—well, the petitioner is John J. Duffy, who is an acting group supervisor, but the man under him to whom the case is assigned is one Myles McCabe. And I would propose that the order state that this statement be made to Myles McCabe, under oath.

The Court: Where is Myles McCabe?

Mr. DiMento: He is a collection officer here in Boston at 174 Ipswich Street.

The Court: Your suggestion is, he could swear to this before a notary public in the State of Florida and send it up?

Mr. DiMento: Yes, your Honor.

The Court: What do you say, Mr. Gottlieb?

[4] Mr. Gottlieb: I think that is a reasonable request under the circumstances.

With reference to the expenditures, I think they might—

that might be a little too detailed. But I think if the man intends to comply with it in substance, he should be given—

The Court: I think the figure was $500 that Mr. DiMento set, was it not?

Mr. DiMento: "The date, amount and nature of each and every expenditure in excess of $500 since November 4."

The Court: I think that is reasonable.

Mr. Gottlieb: Yes, I do.

Mr. DiMento: Well, on that point, I neglected to point out to your Honor that this order as we proposed it would also require that, commencing with the date of service of this order and until further notice, at the end of each week the respondent shall submit to the collection officer,—that is, Myles McCabe,—a written statement under oath of the amount of his expenditures during such week. I think that can be done without the $500 reservation because he has notice of it and can easily keep a record of all his expenditures during the week in future weeks.

The Court: In view of the rather extraordinary circumstances of the defendant not being here before the Court, that we have adverted to in the past, I will enter such an order also; and that will continue from week to week until further notice. And you and Mr. Gottlieb can decide among yourselves, if you can, [5] with relation to what is to happen next.

Mr. DiMento: Thank you. I think the pressure is off us with that order.

The Court: All right. I gather that is not in final form.

Mr. DiMento: No.

The Court: And that you will prepare an order along the lines that we have mentioned and get Mr. Gottlieb's initials on it, or else if he disapproves to have him come up, but if it is initialed, I will sign it without further hearing.

Mr. Gottlieb: Now there is one other matter about the examination. He is waiting down there for a mental—for a health officer. Probably there is a mental doctor there, too—but for a health officer, and I was wondering what was being done to get a health officer.

Mr. DiMento: Nothing has been done on that score as yet; but I shall call the United States Attorney in Miami Beach today and I think we can arrange that between ourselves.

When you said Mr. Gottlieb, you asked Mr. Gottlieb to initial it, your Honor, did you mean by way of consent to your order, or by way of—

The Court: No, as to form.

Mr. DiMento: As to form.

The Court: Yes.

ORDER.

E.B.D. No. 55-67-A

January 10, 1956.

ALDRICH, J.

This matter came on for hearing before Aldrich, J., in the United States District Court for the District of Massachusetts on the 10th day of January, 1956, petitioner and respondent both appearing by their respective counsel. Counsel for respondent represented that respondent was presently without the District of Massachusetts and further represented that the health of respondent was such that he could not return to Boston, Massachusetts, to appear personally at the hearing.

It appearing to the Court that the failure of respondent to appear in person at the hearing and the delay consequent upon the determination of whether, in fact, his health condition is such that he can return to Boston, Massachusetts, and appear in response to the Order of Show Cause heretofore entered might hinder and delay the petitioner in his efforts to enforce the Internal Revenue laws in respect to

the tax liability of the respondent; it is, therefore, by the Court

ORDERED, ADJUDGED and DECREED that the respondent, Samuel C. Brody, submit to Collection Officer Myles P. McCabe, Internal Revenue Service, 174 Ipswich Street, Boston, Massachusetts, within seven days after entry of this Order a written statement under oath of the following:

(1) The date, amount and nature of each and every expenditure by him in excess of $500 since November 4, 1955.

(2) The disposition of the proceeds of the following described checks drawn by H. C. Wainwright & Co. and endorsed and cashed by the respondent, and the present location of any property acquired with such proceeds:

Date Check Drawn	*Drawee*	*Amount*	*Date Check Cashed*
11/9/55	Boston Safe Deposit & Trust Co.	$ 2,600.00	11/9/55
11/9/55	National Shawmut Bank	10,950.00	11/9/55
11/10/55	" " "	26,800.00	11/10/55
11/10/55	" " "	44,000.00	11/10/55
11/11/55	" " "	37,400.00	11/14/55
11/14/55	" " "	80,000.00	11/14/55
11/15/55	" " "	47,500.00	11/15/55
11/17/55	" " "	31,500.00	11/17/55
11/25/55	Boston Safe Deposit & Trust Co.	3,620.27	11/25/55
11/29/55	Second National Bank-State Street Trust	48,105.59	11/29/55

(3) If the proceeds of the aforementioned checks have not been disposed of, a statement of the present whereabouts of such proceeds.

(4) A full and complete statement of all assets whether held by the respondent or held by others for him or held by him for the Charles Trust, so-called, of every kind and nature, their present location, and their present value.

It is further ordered that commencing with the seventh day after entry of this Order and until further notice, at the end of each seven-day period the respondent shall submit to the said Collection Officer Myles P. McCabe a written statement under oath of the amount of his expenditures during such seven-day period and of any changes in form, amount or location of the assets enumerated in the sworn statement required by this Order to be submitted.

(s) BAILEY ALDRICH
United States District Judge

Dated Jan. 10, 1956.
(s) A.G.

ORDER.
E.B.D. No. 55-67-A
July 12, 1956.

ALDRICH, J.

This matter came on for the taking of evidence and arguments before Aldrich, J. in the United States District Court for the District of Massachusetts on the 6th and 12th days of July, 1956, respectively, petitioner and respondent both appearing by their respective counsel.

The Court having found that the respondent is prima facie of sufficient good health to state to his attorney the nature, amount and whereabouts of his assets so far as such information is within the knowledge of the respondent; it is, therefore, by the Court

ORDERED, ADJUDGED and DECREED that the respondent, Samuel C. Brody, through his attorney Arthur Gottlieb, Esquire submit forthwith to Collection Officer Myles P. McCabe, Internal Revenue Service, 174 Ipswich Street, Boston, Massachusetts, a statement of the following:

1. The date, amount and nature of each and every expenditure and disposition of assets by him in excess of $500.00 since November 4, 1955.

2. A full and complete statement of all assets whether held by the respondent or held by others for him or held by him for the Charles Trust, so-called, of every kind and nature, and their present location.

It is further ordered that this Order shall continue and remain in effect day by day until further order of this Court and shall in no way revoke, modify or otherwise alter the terms and effect of the Order of this Court entered herein on January 10, 1956; nor shall compliance with this Order in any way prejudice the rights of the United States of America in the proceeding now pending before this Court designated "United States of America v. Samuel C. Brody, E.B.D. No. 56-29-A".

(s) BAILEY ALDRICH
United States District Judge

Dated July 12, 1956.

HEARING.
Court Room No. 2, Federal Bldg.
Boston, Massachusetts
Thursday, Dec. 27, 1956; 3:30 p.m.

[2] The Clerk: Emergency business 56-29, United States against Samuel C. Brody.

[The defendant steps to the bar.]

The Court: You don't need to stand at this time, Mr. Brody.

All right, Mr. Caffrey.

Mr. Caffrey: May it please the Court, I would like to note the defendant is personally present and is represented by counsel.

Your Honor is completely familiar with the crime of which this defendant stands convicted as detailed in the

opinion handed down by the Court this date, and I will not elaborate on that.

The defendant, Samuel C. Brody, resides at 10 Crosby Road, Newton. He is aged 59. He is a widower. He is the sole support of a son, who is in his early twenties, and who resides with the defendant when he is not attending college. The defendant is in semi-retirement and has been since approximately 1950.

The offense of which the defendant stands convicted consists of a deliberate defiance to respond to a request made on behalf of the Internal Revenue Service for information relating to the tax liability of this defendant. The position of the Internal Revenue Service is that it is entitled to the information which it has sought to obtain. The position of the District [3] Director is, that either the defendant should now pay the amount found to be due, either by determination of his liability for the years 1943 through 1946, by determination in the Tax Court or by stipulation filed in connection with Tax Court proceedings; or, if he does not pay the amount so established as being the extent of his liability, he should furnish a complete and detailed sworn financial statement setting forth his asset position, and, of course, any reasons why he contends he is unable to pay his tax liability in full.

Within the last week or so, the defendant, after some eleven months of oral promises, has reduced to writing a proposition which he has submitted to the Regional Counsel of the Treasury. In that he has outlined a settlement proposal. That proposal has as yet not been confined, accepted or rejected; and that proposal, as I understand it, goes mainly to determining the extent of the taxpayer's liability. It does have a suggestion that a $200,000 down payment be made as a part of his liability, but it has no provision as to satisfaction of his remaining liability which, if the proposal is accepted, would be $225,000. I am in-

formed by the District Director that no commitment on behalf of Treasury has been made as to any part of this proposed settlement.

Turning to the disposition of this case, your Honor, the defendant does have a criminal record. He was convicted of several not too important traffic violations in the years 1924, [4] '25, and thereabouts; and, in 1950, he pleaded guilty in Suffolk Superior Court to an indictment consisting of approximately 60 counts charging him with larceny from Sears Roebuck Company in the amount of approximately $67,000. On October 9, 1950, he received sentences which totalled 6-10 years in State's Prison, and he served 4 years in State's Prison and was paroled on October 8, 1954, and is currently on probation. Pardon me, your Honor. He is currently on parole.

It is the position of the Government that this defendant, taking into account his persistent refusal to comply with a series of lawful orders of this Court, and in view of the fact that he possesses a substantial criminal record, and in view of the fact that he has shown a wilful disregard for the legal process and for lawfully constituted authority, and, further, in view of the fact that all attempts of various law enforcement agencies of the United States Government thus far to disclose the whereabouts of his assets have been unavailing, should be sentenced to serve time in a penal institution, and it is the recommendation of the United States Attorney's office that the defendant be sentenced to serve eighteen months.

The Court: Mr. Gottlieb, as I told you in chambers, and I will repeat now for the record, I have taken, as you know, a serious view of this case for a long time. I have impressed upon you to impress upon your client that it was a serious matter, and I would not entertain any argument from you on the [5] matter of whether there should be a sentence or not,—that is, a jail sentence or not. I see

no point in a fine in this case, in view of the economic background of it. There is no reason that I can think of why I should order him to pay money to the Government as a fine when already the Government seems not to be able to discover enough assets to collect what is due to it or may be due to it on his taxes. A jail sentence seems to me the only thing that I can properly entertain in view of all the circumstances; and I would like to hear from you simply on the subject of how long that jail sentence should be.

Mr. Gottlieb: Would you Honor oppose my arguing the question of a suspended sentence?

The Court: I see no point in a suspended sentence, either. I will also, as I told you, naturally be receptive to a motion for you to stay the execution of sentence pending appeal, providing the appeal is promptly prosecuted; but, so far as suspending the sentence itself, that also I am not interested in. Whether at some subsequent date the respondent may be able to purge himself in part from the contempt that I have already found he has already committed over a period of time, is also a matter which I am not interested in at the present moment.

Mr. Gottlieb: Well, I will try to follow your Honor's outline—first getting down to the negotiations with the Revenue Agents and the Treasury Department.

Mr. Brody himself, through Mr. Murray in Washington and myself, from the very start, has been negotiating with the [6] Treasury in an effort to settle his tax liability. These proceedings arise from his failure to meet his tax obligations. Now, he volunteered last August himself to get in touch with the Treasury officials to negotiate a settlement. Up until that time Mr. Murray had been negotiating for him and had made certain offers, and Mr. Brody himself arranged for a Treasury official to come to his home—and it was on his own initiative—to

try to settle up his tax obligations. And at that conference, although he was not a well man, he withstood the effects of the conference and agreed to pay pretty nearly the amount the Treasury was ready to settle for. He offered around $375,000; the Treasury was ready to settle for around $425,000. His offer was rejected. And again, a short while ago, he appeared with me in the Treasury Department, and we met the terms of the Treasury offer to settle. We agreed to pay $425,000. We agreed to pay $200,000 down. And the papers were processed through the Regional Counsel's office. And, by the way, we have been waiting up until this very day for that processing to go through. We were told that the processing would not be completed until the middle or the latter part of January; and, as far as I know, Mr. Brody is negotiating in good faith, and is ready to meet his obligation in reference to that particular agreement.

As far as the Collector is concerned, Mr. Brody authorized me to go down and make arrangements for the balance; and we have negotiated for the balance; and I have an oral [7] agreement from the District Director of what he would take for the balance, and I have confirmed that in writing.

So that all these matters have been taken care of as far as agreements are concerned; and if those things had been taken care of in the first instance there would have been no basis at all for this proceeding. Yet, I feel, when the District Attorney makes the recommendation he does, these matters which are very vital as I see it are not taken into account.

Now, Mr. Brody himself is a sick man. Your Honor was persuaded in believing that last July. I think your Honor mentioned it in one of your opinions. Although he may be a little better today than he was last June, he still has the basic diseases of the heart which could very easily

erupt and cause a very serious episode; and it seems to me that, in view of his physical condition, anything but a light sentence should be rejected if your Honor is disposed to impose sentence. I am not going to argue in detail the details of his health. I merely say that the doctor your Honor appointed back in June or July has made a recommendation to the Court which prompted the Court to acknowledge that he was a very ill man; and the same doctor, back a month or so ago, re-examined him and found his health much improved, and that is the reason we had this hearing today. If his condition had remained the same, probably this would not have come up.

[8] Now, this man is 61 years of age. In view of his health, he's probably at the twilight of his life. That also is a matter that I bring to your Honor's attention in considering sentence.

With reference to what he had done—without considering the matter of jurisdiction of the Court or other technical points, but confining ourselves to what he had done—I call to your Honor's attention that he was suddenly confronted with a jeopardy assessment. This assessment did not come about as a result of a plenary hearing before a Tax Court. No Judge decided that he owed those taxes. It is only because the Government got tired of waiting that they used those powers in jeopardy to impose this jeopardy assessment. He did not have the opportunity just before that time to argue with them on whether he owed six hundred thirty-odd thousand dollars or four hundred thousand dollars or three hnudred thousand dollars. And when we finally came to the decision, to the settlement of the $425,000, that amount was arrived at after an outstanding attorney in the Regional Counsel's office, with a technical staff, had appraised the value of the tax claim from their point of view; they reviewed the reports of the agents, and they decided that, from the

point of view of a tax attorney, $425,000 rather than close to $700,000 was due. That shows that Brody had a right to be at least incensed about the amount of the jeopardy assessment; and that, too, should be a determining [9] factor in this sentence; in other words, he was confronted with an exorbitant tax and not a tax which was within reason.

Now I have argued the matter of the difficulty of complying with the order, and I think your Honor should bear in mind what I have said on this matter before. It was a very onerous burden, and, if a man is asked to do what is very difficult, it seems that whether he is in contempt in failing to comply is more questionable, to say the least. If he was to have responded to your Honor's order, it would have meant that he would have remained penniless.

Considering his position in life, his age, and his health, it was all the more difficult for a man in his position to have faced that sort of a position. Nonetheless, he is now ready to pay over $200,000—to pay $200,000 now, and to pay $37,500 annually, plus interest. Those are his terms; those are the terms that were submitted by the Treasury Department.

And I also call to your Honor's attention that the man is on parole, which does not expire until April, 1958, and I assume that your Honor has taken that into account before imposing sentence.

There was a great deal said about the Fifth Amendment, I noticed in your Honor's opinion. There is a great deal of discussion about it. I must say, in fairness to my client—and I went to Washington a short time ago and Mr. Murray is agreed with me—that if this is material on the Fifth Amendment, [10] both Mr. Murray and myself were asked by Mr. Brody, as late as the latter part of January anyway, to plead the Fifth Amendment for him, and I feel, as counsel for Mr. Brody, that it is my duty to openly state that in court.

The Court: Did it occur to you that it might have been your duty, or did it occur to Mr. Murray it might have been his duty, to have said that on the witness stand, subject to cross examination—not that I wish to impune his conduct or the word of any member of the bar; but that matter was certainly brought out fully so far as being an issue in the case when we had a hearing earlier this month. Both of you gentlemen were in court.

Mr. Gottlieb: Well, if what Mr. Brody had said was contrary to our understanding, we would have spoken, but we remained silent because what we had said we thought was substantially correct, and I was trial counsel at the time, and I didn't want to get involved in testimony.

The Court: I can appreciate your position to an extent. It could have been a difficult one. Mr. Murray was not in that position.

Mr. Gottlieb: Now your Honor has spoken; so that as far as the Fifth Amendment is a defense to this case there is nothing more I want to say to the Court.

The Court: So far as the Fifth Amendment is concerned, I must respectfully say that I do not feel that I can appropriately take your statement at this time.

[11] Mr. Gottlieb: Yes. But I feel, on the other hand, it is my duty as an attorney and a member of the bar, to speak up as I have under these circumstances, in fairness to Mr. Brody.

The Court: You raise a very troublesome question, Mr. Gottlieb—not that I criticize anybody for raising troublesome questions—that's what I'm here for; but I do think this is a very strange time to bring the matter up.

Mr. Gottlieb: Well, I think that your Honor's opinion has probably pinpointed this matter, highlighted it, on whether we as attorneys knew about Mr. Brody's request that the Fifth Amendment be pleaded in his behalf. What we attorneys said to that is another matter—we are not

discussing that—as the reason why we did not follow his instructions. That is a matter between attorneys and client.

The Court: Are you making any suggestions or motions with respect to it?

Mr. Gottlieb: If your Honor feels that this factual matter is broad enough—I notice that your Honor has disposed of the issue on several grounds—but if your Honor thinks this particular ground is a vital one, I would be glad to ask your Honor to reopen this matter so that you can take the testimony of both Mr. Murray and myself on this particular matter.

The Court: I am not prepared, on 60 seconds' notice, to say how vital I consider it, or whether I consider it [12] determinative, but I will listen to any motion that you care to make to reopen it.

Mr. Gottlieb: Well, in your Honor's opinion, one of the important grounds for refusing to accept the Fifth Amendment is, that Mr. Brody was tardy or delayed in pleading the Fifth Amendment. It is true that the Court did not receive notice of his intention to plead the Fifth Amendment until July of this year. It is true that answers were filed by myself in which the Fifth Amendment was not mentioned. It is also true, and I know it to be the fact, that Mr. Brody had asked that that Fifth Amendment be pleaded for him, as late as the latter part of January, 1956.

I think that as a matter of law an attorney cannot waive the Fifth Amendment for a client unless he is expressly authorized to do so. Mr. Murray and myself probably have impliedly waived it on his behalf by filing answers without mentioning the Fifth Amendment, or by making certain allegations which probably might have been consistent with the plea of the Fifth Amendment. But nonetheless, as I understand the law, no attorney can waive the Fifth Amendment unless he is expressly authorized to do so by the client. The attorneys here received no such express authority. In

fact, I know it to be the truth, we were told to plead it, or we were told that he wanted to plead it. And under those circumstances, I ask that the matter be reopened so that if your Honor wants evidence on that point, [13] we will be glad to furnish whatever evidence your Honor thinks is appropriate under the circumstances.

The Court: Do you care to be heard, Mr. Caffrey?

Mr. Caffrey: Yes, your Honor.

First of all, I think my brother still fails to appreciate the point in the opinion of Judge Augustus Hand in the case of United States v. Benjamin, namely, that the privilege of claiming the Fifth Amendment is a personal privilege to the witness who must appear in answer to the subpoena and raise it to a specifically incriminating question, or even a possibly incriminating question, that it is not a blanket authority simply to stay home and ignore the whole proceedings.

The Court: That is a double-edged proposition you are handling, and I have not yet determined that matter, not having found it necessary up to this moment to consider it. If it was necessary for him to appear in order to claim it and he couldn't appear, then how could I say he waived it since he didn't have the opportunity to make it?—if you make that assumption.

Mr. Caffrey: I think they had a continuing order, and I think there has been a finding made at various times that he had ability to comply with the order.

The Court: I certainly have found that, and I would certainly include in that the finding that he had ability to write the letter such as Mr. Gottlieb wrote on the 6th of July, long before Mr. Gottlieb wrote that letter. If he had to appear [14] in Court and do it, I have not found whether he could or could not.

Mr. Caffrey: Well, passing that point I am not familiar with, I think Mr. Gottlieb's very last statement is illu-

minating. He corrected himself to say that the defendant directed him or Mr. Murray to plead it, and he amended it to say merely that the defendant wanted to plead it; in other words, he started to say that they were directed to plead it but at the very end of his remarks he corrected it to say only that the defendant wanted to plead it. There is no doubt the defendant wanted to do a lot of things but I don't think that gives them legal significance or legal standing.

Likewise, if it be in point, your Honor, I have discovered one case which was decided in 1953 in the Eastern District of Michigan, a case against John Lloyd Taylor. I don't think there is a report of opinion on it. Here the defendant under subpoena appeared through his counsel and filed a motion to quash on the ground of the Fifth Amendment, and I think there is somewhat of an analogy to this case.

The Court: I wouldn't have any trouble with that. He couldn't do it.

Mr. Caffrey: Yes, he could not do it; that is what the Court said.

The Court: But that does not solve this problem.

Mr. Caffrey: I think it is somewhat in point. Likewise [15] I think we have the question of whether or not the defendant, having received his full opportunity to have his day in court, is now in effect trying to come along with something analogous to evidence, I suppose to meet the classic test of newly discovered evidence. Certainly it is not newly discovered. I think the people who could have made the statements which counsel is now seeking to make were present in court, and he had every opportunity to call them.

The Court: Whether the principle is applicable or not, certainly the facts upon which it would be applied speak for themselves. Whether the principle is applicable or not, I have more trouble with. The matter of the Fifth Amend-

ment so far as pertinent must be jealously respected; and I do recall Mr. Brody testified, not merely that he spoke to his counsel about the Fifth Amendment, but that his counsel told him he couldn't do anything about it. Since neither counsel—I won't go into it any further than what I say at this time.

Mr. Caffrey: Well, I think I have nothing further to add at this time, your Honor, on the point.

The Court: Yes.

In view of the seriousness of which I regard the respondent's continuing disregard of the Court's order, which is a considerably different matter than both counsel have argued as to other things he did or did not do, and in view of the opinion that I have filed, and in view of the fact that there is [16] involved the defense of the Fifth Amendment which I regard as something more important than the ordinary give and take in the ordinary criminal case, I will grant the motion to reopen. When can the witnesses be heard?

Mr. Gottlieb: Well, I'll be ready at any day. I will have to call Mr. Murray and make arrangements for him to come here.

The Court: I suggest 10 o'clock, January 4th.

* * *

STENOGRAPHIC RECORD OF TRIAL

* * *

Court Room No. 2
Federal Building, Boston
Monday, January 7, 1951
10:00 a.m.

[144] The Clerk: E.B.D. No. 55-29, United States versus Samuel C. Brody; E.B.D. No. 55-67, John J. Duffy versus Samuel C. Brody.

Mr. Jackson: If your Honor please, the defendant is not here, and I ask if I should proceed without him?

The Court: He has appeared on previous occasions, and perhaps we could proceed in his absence if counsel has no objection.

Mr. Caffrey: No objection on our part, your Honor.

Mr. Jackson: No objection on the part of the defendant.

The Court: If Mr. Brody said this morning to Mr. Gottlieb he had no objections?

Mr. Gottlieb: Yes. He may come later.

The Court: All right.

Mr. Gottlieb: He is delayed on account of the storm.

The Court: Very well.

Closing Argument by Harold C. Jackson, Esq.

If your Honor please, coming into this case at this late date, and after reviewing the transcripts of the many hearings that have been held, I have been struck by the attitude of extreme fairness and justice which your Honor has evidenced both to the respondent and to the Government. This to me was strikingly demonstrated in the hearing of December 27th, when on [145] your own initiative you suggested you would be willing to listen to a motion to re-open the case in order to afford the respondent a full opportunity to exercise his rights under the Fifth Amendment in so far as it was open to him to do so. And I was also greatly impressed by your statement that "the matter of the Fifth Amendment so far as pertinent must be jealously respected."

In your opinion of December 27th, your Honor stated that in your view the Fifth Amendment must be considered because the respondent has no other defense. I will therefore direct my attention particularly to that aspect of the case, although the subject of the respondent's health is of

importance because of its bearing on whether he has ever had an opportunity to legally exercise his privileges.

In this connection, I would like to refer to the finding made by your Honor on July 12, 1956. At that hearing, quoting from the transcript on page 2, your Honor stated:

> "So far as the evidence is concerned, I of course find that the respondent has a heart condition, and on the basis of the opinions of the doctors appointed by the Court and by the United States Attorney, he is not presently able to appear before the petitioner and testify, and he is not presently able to appear here. I do not question what those doctors say in that regard. I do find that if the respondent could testify and could appear before the petitioner for that purpose, [146] that the petitioner could and would ask for the information which he now asks through the United States Attorney, that I order to be furnished."

The case of the United States v. Benjamin, which is referred to by your Honor in your opinion of December 22, 1956, states,—and I quote from the opinion:

> "The privilege of claiming the Fifth Amendment is a personal privilege to the witness, who must appear to answer to a subpoena and raise it to a specifically incriminating question, or even a possibly incriminating question, and it is not a blanket authority simply to stay home and ignore the whole proceedings."

Mr. Caffrey referred to this in the hearing December 27th, and your Honor, very properly, I think, pointed out it was necessary for him to appear in order to claim his privilege, and if he could not appear, then he could not say he had waived it since he didn't have the opportunity to make it.

The Court: Well, I think I will interrupt you right there, in case by my silence I might even appear to suggest I was agreeing at all that that was what I meant. I was referring to the question of his respecting the summons as an abstract

proposition, and in December of 1955, because the question did not involve whether he was to stay home, where the only question that I was considering was the hypothetical one of whether he [147] could stay home because if he got there he would claim the Fifth Amendment, or whether he was supposed to go and claim the Fifth Amendment only when he was asked questions which would incriminate him. I was not discussing the question of whether he could claim the Fifth Amendment—this particular defendant—in some other way than appearing when he wasn't able to appear. Perhaps I am not making myself too plain, by the looks on your face.

I did not intend by that language, and I am not intending now, to say that when a man is so crippled that he can't appear but is ordered to answer certain questions, that he then is excused from making any response whatever to those questions. Mr. Gottlieb, on the 16th of July, furnished an answer, which was the defendant's answer alleging the Fifth Amendment; and, in my opinion, if it was appropriate to claim the Fifth Amendment, that was, under the circumstances of this case at the stage it was then in, precisely the way it should have been claimed. I was not saying—

Mr. Jackson: Well, I didn't mean—

The Court: I was not meaning by anything I said in that opinion with relation to the summons of a year ago December, that it meant a man had to walk into a place when he couldn't walk into it.

Mr. Jackson: I assumed, your Honor, that since the defendant, the respondent, did not appear in answer to the [148] summons that was issued from this court, or from Mr. Duffy, he might be open to some punishment for not having answered it if your Honor arrived at the conclusion—

The Court: Well, with relation to Mr. Duffy, we're not talking; but, with relation to me, we certainly are talking;

and what I have said with relation to Mr. Duffy would not cover the situation.

Mr. Jackson: Well, I will leave that out. But even in the case of the petition brought in this Court, I suggest that if the defendant was unable because of ill health to appear, he could not exercise his right under the Fifth Amendment.

The Court: I don't agree with you at all.

Mr. Jackson: Well, I think the cases seem to point that out, your Honor.

The Court: If you will give them to me, maybe I will change my mind.

Mr. Jackson: I am referring to Wigmore on Evidence, which has a collection of cases; and there is a very long section on this subject, your Honor, and I will quote that to you in just a moment.

In my opinion, your Honor, the Benjamin case, which was quoted before, reflects the law with respect to claiming the privilege of the Fifth Amendment, because that case points out at some length, if you recall, that no defendant has a right to refuse to honor a subpoena if he is physically able to come into court; he can't, as I think they attempted to do, seek to have [149] the subpoena quashed on the basis that the questions which might be asked him might tend to incriminate him.

The Court: That is right; and that is what I was talking about when I made that prior statement.

Mr. Jackson: Yes. But I am still of the opinion, your Honor, in my view of the law, that the defendant must be before the Court or tribunal in order to raise or claim the Fifth Amendment; he must be under oath, for example; and it will be our position in this case, of course, that the defendant has never, up until late in 1956, when he did appear, been in position to claim the Fifth Amendment.

Now, in this connection, your Honor, I would like to call your attention to the language in th petition that was filed in this case for attachment for co tempt in the first instance. That is the petition that was filed late in December, '55. If your Honor will recall, this petition in itself does not ask for any information from the respondent. There are five prayers, and the last one is the petition for general relief, and the other two deal with, first, this Court issue an order to the respondent to show cause why his person should not be attached for contempt; and the second, that this court issue an order to the respondent attaching his person as for contempt; and third, that this court issue an order to the respondent to show cause why he should not be ordered to appear and testify as directed by the summons on a date fixed by this court,—presumably referring to the summons of Mr. Duffy, and that this [150] Court issue an order directing the respondent to appear and testify as directed by the summons on a date fixed by this Court. In other words, the petition did not warn the respondent in any way that he was expected to give information at the hearing on this petition: it warned him he should appear before the Court and receive such orders with reference to information as might be directed by the Court.

Now the order to show cause which issued on that petition merely ordered, adjudged and decreed that the respondent Samuel C. Brody be directed to appear before Aldrich, J., United States District Court, District of Massachusetts, on the 9th day of January, 1956, at 3 o'clock p.m., then and there to show cause, if any, as to why his person should not be attached as for contempt. Again the respondent was not warned that any information would be expected of him.

Now, I point this out to your Honor—that when the 9th of January arrived—I note your Honor's order stated January 10th, but for some reason it went over to the

next day—your Honor issued your order in the absence of the defendant, and that prior—

The Court: Only because of the lack of appearance. Mr. Gottlieb appeared on the 10th.

Mr. Jackson: Oh, I see.

The Court: On the 9th, I asked him whether he was authorized to enter a general appearance, and on the 10th he entered it. That is what happened.

[151] Mr. Jackson: Yes, I assumed that something like that had happened. But then, on the 10th, your Honor entered the order in question, and you will recall that order was entered prior to the time that Mr. Gottlieb filed an answer. Now I am not sure in my own mind whether under a pleading of this sort an answer was actually called for, but, at any rate, Mr. Gottlieb did enter his answer after your Honor had made your order.

Now a great deal has been made of the fact that in that answer and in subsequent pleadings filed by Mr. Gottlieb no reference was made to the Fifth Amendment. Well, to me it would seem a useless gesture, at any rate, because your order had already been entered. It might have served the purpose of calling earlier to your Honor's attention the fact that the defendant did have in mind the claiming of the amendment; but, actually, the order had been entered prior to the time that the answer was filed in the case.

It is our position, your Honor, that if the respondent's health had permitted him to appear, your Honor might have ordered him under that petition to appear before the Internal Revenue for questioning, at which time he could have exercised his privilege of claiming the Fifth Amendment; or, if on the return day of this order to show cause the respondent was before the Court, you might have asked him to produce the information referred to on January, 10, 1956. He would be before the Court, and I think it would be most proper for you to say, "Well, now, [152] the

Internal Revenue Department wants this information, and where is this asset, and where is that asset''—at which time, of course, he could have claimed his privilege under the Fifth Amendment.

Now your Honor's order issued January 10th ordered the respondent to furnish certain information in writing to the Internal Revenue Service. If this information had been asked of the respondent on an appearance before the Collection Officer,—you ordered him to furnish this information to the Collection Officer. If he had appeared in the first instance, before the Collection Officer of the Internal Revenue, he would again have been in position to claim the benefit of the Fifth Amendment. However, your Honor's order was issued in the absence of the defendant, which absence was due to the condition of his health.

Now I assume that your Honor in granting the re-opening of this hearing had in mind two possible reasons for doing so. One was, to be zealous about the rights of the defendant under the Fifth Amendment; also, to take actual evidence from the doctors regarding his health, because up to that time you had only affidavits on the part of the defendant's doctors. If your Honor had been convinced that the respondent's health was such that he could have been present on the return day of the order to show cause, which you never did find—the nearest to that is your finding he was not able to come to court—then conceivably he might have been subject to punishment for failure [153] to obey the order to show cause.

That is the position I take, your Honor,—but if his failure to appear—

The Court: I said in my previous opinion something analogous to that—that that was not what I considered, and it is still not what I consider. I am interested in the matter of the order of the 10th of January primarily, and, secondarily, I am perhaps interested in the order of the

12th of July. You don't need to argue the other aspects, except perhaps they might be material under the whole situation. In other words, I quite possibly may make some findings on the evidence I have; but, so far as contempt is concerned, it is restricted to those two orders.

Mr. Jackson: Yes. I quote again from your opinion of December 27th, in which your Honor found, and I quote, "This hearing is not for failure to respect our original summons."

The Court: That is right.

Mr. Jackson [reading]:

> "There is no question but that the respondent's health is not good, and as a result of medical opinion following examination, I did not order him to appear. I did not pass on whether physically he would or would not have been able to appear earlier than he did, and the present proceeding relates solely to his failure to obey [154] the order which I issued compelling attendance in person."

Does that state your position, your Honor?

The Court: Yes, it does. As I say, it may be in any opinion I write when I eventually look for the facts as they seem to me, that background may have some materiality on the whole situation; so I don't cut you short in any way from arguing any evidence that you want to; but, so far as contempt is concerned, that states my position.

Mr. Jackson: Referring again, your Honor, to the Fifth Amendment, I submit that following the jeopardy assessment the respondent had reasonable cause to apprehend the danger that a responsive answer relating to the whereabouts of his assets, might subject him to prosecution under Section 7203 of the 1954 Internal Revenue Code, which makes it a crime to wilfully fail to pay such tax when assessed. Although the respondent's tax liability is for

the years 1942-1946, it was not assessed until November 4, 1955.

On this phase of the case, I refer your Honor to Mr. Gottlieb's memorandum of law which dealt with that at some length on the question of the Fifth Amendment.

The Court: You just mentioned 7403. I think he mentioned 7401.

Mr. Jackson: Yes.

The Court: Do you include that?

[155] Mr. Jackson: This is 7203.

The Court: Excuse me. It was the "03" that caught my eye. He also had "01". I have difficulty with all of them, but I have more difficulty with "01" than I do with "03".

Mr. Jackson: The reason we relied particularly on 7203 was, I remember a case in this district when I was in the United States Attorney's office, the Angell case, in which the defendant was prosecuted for failure to pay taxes, not for evading taxes but, having the ability to pay, for failing to pay. It seems to me analogous to our situation here. That is why I mention that section of the Code.

Now, with reference to the matter of the medical testimony, I am hopeful your Honor has now been convinced from the personal appearance of Mr. Brody's two doctors, as well as the assistance you have had from the Government's doctor. Of course, as you have stated over and over again, Mr. Brody is a man in very poor health.

The Court: I don't think I said very poor. I said it wasn't good.

Mr. Jackson: It wasn't good. I am arguing to you now that as a result of all this cumulative evidence it was perhaps as I described it.

The Court: For the record, I note that Mr. Brody has now arrived.

Mr. Jackson: Now, with reference to the testimony of

[156] Mr. Murray and Mr. Gottlieb, they of course have now taken the stand, and I hope your Honor, and I hope there rests in your Honor's mind the feeling that you had expressed in your opinion of December 27th—that it was inconceivable that the subject of the Fifth Amendment could have been discussed between counsel and the respondent without its ever having been brought to your attention earlier than July, 1956. Both of these attorneys testified they did not formally plead the Fifth Amendment because of the requirement, in their minds, of the law, that the privilege is to be raised by the respondent personally when before the Court or other authorized tribunal; the privilege, being a personal one, cannot be waived by counsel, and the failure to plead the Fifth Amendment in the answer filed in this case cannot be taken, we submit, as a waiver. I submit that none of the statements amounted to an admission of guilt of any Federal crime, or that, having admitted part of the crime, he waives his right to exercise his privilege under the Fifth Amendment.

And again, your Honor, I comment on this fact: that, because of the cases in Wigmore on Evidence on this particular subject,—

The Court: You haven't given me that citation.

Mr. Jackson: Yes, I have that here, your Honor. It is the Third Edition, Section 2268.

The Court: Thank you.

Mr. Jackson: Our position has got to be, and it seems to me the only position we can take, your Honor, that the question [157] of pleading the Fifth Amendment is a personal question, as these cases state, and as Wigmore outlines at some length. The witness must be before the Court and sworn before he can claim his privilege. And it is that point we stress here, because, up to the point that he actually made his appearance later in the year, the respondent was not actually before the Court and sworn.

Now there isn't much more I can say, your Honor. I think I can sum our position up briefly in this: that we rely strongly upon what we conceive to be the law—that the respondent must be before the Court personally, he must be sworn, a question must be put to him before he can exercise his right to claim the Fifth Amendment.

We submit to your Honor that the condition of the defendant's, respondent's health throughout these proceedings has been such that he could not be before the Court—at least your Honor has not found or did not find, up until late in the proceedings, that he was able to be before the Court, or I assume, if you had, you might have had a bench warrant issued for his arrest and had him brought before the Court. You never did exercise that right, although it was suggested to you by the United States Attorney. Therefore, because of his health, he has never been before the Court, never had an opportunity to claim the Fifth Amendment, and the effect of your order of January 10th, 1956, in substance is to deprive him of his right to exercise that privilege. If your Honor should continue your [158] finding—

The Court: You mean, you go so far as to say that I have deprived him because, not having ordered him to appear, I deprived him of it?

Mr. Jackson: Because you never had him brought before the Court, your Honor. I don't say that in any equivocal way. I merely mean the effect of your order is, he has not had the privilege of exercising his right; and the information which you sought in that order was the kind of information that would have been sought from him by the collector, or by yourself if he had been before you, at which time he could have exercised his privilege.

Now, with regard to the relief we might ask of your Honor at this time, again I want to express our appreciation for your justice and fairness in this matter in granting

us this further hearing, and it is our request, respectfully, that you withdraw your previous opinion, your Honor, holding the respondent in contempt, and that you make such order as may seem proper with regard to ordering the respondent to appear further before you to acquire this information, or before the Collector's Office, at which time he can bring forth his claim to the Fifth Amendment and have it disposed of at that time.

[159] *Closing Argument by Andrew A. Caffrey, Esq.*

May it please the Court, I would like to say just a very brief word concerning the medical testimony. I do not believe any extended discussion thereof is necessary, but I submit, your Honor, that the medical testimony gives rise to no occasion for you to make any change in the written opinion of December 27th. Your Honor heard the two cardiac experts from Boston and the soi-disant listener from Miami, and they, in substance, indicated he had a heart attack; but certainly Doctor Welch's testimony indicated that he had an ability to comply at the time when he was most sick in the period involved, namely, when he was a patient at the Beth Israel Hospital, and at substantial other times during the interim.

I mention that medical testimony, not so much on the medical point, your Honor, but I think it cuts across to the general credibility of the representations made to your Honor, both at argument and in pleadings filed. Tremendous stress has been laid upon the defendant's physical condition, and, while there is no question he is a coronary patient, the extent and the seriousness of that, I submit to your Honor, may be found by your Honor to have been greatly exaggerated during the course of litigation, when evaluated in the light of the testimony. And I would particularly like to draw your Honor's attention to the testimony of Doctor Kramer with reference to the December

14th visit of the defendant. I think Doctor Kramer was genuinely [160] confused even on the witness stand last Friday as to how this "atque ave vale", "hello and goodbye", visit popped up. The defendant had no appointment, Doctor Kramer couldn't understand what he came in for, made no change in the treatment he had prescribed, and I submit on the stand he seemed still puzzled as to why the visit occurred.

I think, in view of the testimony of Mr. Gottlieb with regard to advancing the administrative subpoena from December 16th to December 14th, and in view of the admission that the defendant had the reservation some three months prior to December 15th, I think you can fairly draw the inference that the visit to Doctor Kramer was part of a deliberate, calculated scheme or effort to set up what amounts to a medical alibi. I submit you may properly draw inferences of deliberate wilfulness and lack of intention to comply at any time, starting way back.

Now, taking the testimony of Mr. Murray and Mr. Gottlieb, first of all, at its face value, I don't think it fairly went beyond saying that they claim the Fifth Amendment was discussed in January, 1956, but not too seriously. My memory is, one of them conceded it was just mentioned. I am quite sure that word "mentioned" was used. I don't think either attorney claimed he was actually instructed to plead the Fifth Amendment. I think your Honor can fairly make a finding on the basis of all the evidence that the defendant had made up his mind not to comply with the order, and then he shopped around for various [161] reasons so as to justify his non-compliance, and if there was any conversation about the Fifth Amendment, he may have casually said, "Well, can we hide behind it?"

Now, turning to Mr. Murray's testimony a little more critically, if I might, I submit that Mr. Murray at the very least can be accused of having an extremely convenient

memory. Mr. Murray was making his second visit to the witness stand here, and your Honor will recall that when he took the witness stand December 11th, he didn't know whether he talked to Mr. Brody in January or February, he wasn't sure whether it was late January, and I think he finally said it would be about the middle of March. In December, he complained nobody asked him to bring up his notes, yet he was an attorney of considerable experience, a member of several bars—rather, the bar of several states, and the Supreme Court, and when he testified here last Friday, while he was under direct examination, he didn't have a very accurate memory on the only point which was of paramount importance to the side of the case on which he was employed. However, when pressed on cross examination, he became evasive, he became argumentative, he tried to snap a question at me, and made complaint that nobody asked him to bring his notes and couldn't remember anything as to time, place, who said what, where and when—except that one self-serving statement, and as to that he didn't go too emphatically into just what was said, other than the fact that the Fifth Amendment itself was mentioned.

[162] Now, I submit to you, your Honor, that there was evidence from which you may find that, as early as December 7th or 8th, the defendant told Mr. Gottlieb that he then and there would be too sick, according to his own way of looking at it, to comply with the administrative subpoena on December 16th; and I think you can find that the request was made to advance that hearing when it was known by both Mr. Gottlieb and Mr. Brody that there would be no appearance of Brody and there would in effect be no hearing. And I think you can find that that is still further evidence of a carefully worked out, deliberate plan of noncompliance with that order, which later was continued, and not complying with the orders of the Court.

We submit, your Honor, that taking all the evidence as a whole, this claim of the Fifth Amendment, in effect, is what amounts to a recent contrivance. Your Honor heard the various representatives of the Government testify—and never was the Fifth Amendment mentioned to them at any time before July 16th. You can also recall the testimony of Mr. Gottlieb himself that there was no serious mention of the Fifth Amendment before an alleged conference held on June 24th, which culminated in the letter of July 16th. I think your finding in the opinion of December 27th—that the Fifth Amendment talk was an afterthought—is well warranted by the evidence.

I think if this hearing Friday did anything, far from shaking any findings which your Honor made in the opinion of [163] December 27th, it gave you a substantial amount of additional evidence showing [1] that the physical ability to comply was grossly exaggerated—rather, the physical inability to comply was grossly exaggerated; and [2] that on all the evidence there was no substantial discussion or investigation of the Fifth Amendment prior to the time at the very earliest of June 24, 1956.

Likewise, I think your Honor might draw some inference from the failure of the defense to try to rebut the testimony of Doctor Welch on the physical point. He certainly substantially repudiated the testimony of the other two doctors on the physical ability point. Likewise, there was no attempt to rebut any of the evidence of the Government employees who testified that they had never heard mention of the Fifth Amendment.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1039

SAMUEL C. BRODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The basic question in this case is whether the taxpayer's refusal to answer the questions contained in the District Court's order of January 10, 1956, was justified in the particular circumstances of the case. The critical facts, as found by the District Court after a full hearing and as reviewed in detail by the Court of Appeals, are as follows: The order of January 10 was entered by the court at a proceeding at which petitioner's counsel entered a general appearance; the order was approved by petitioner's counsel (Pet. 25). Petitioner discussed with counsel the possibility of asserting his privilege under the Fifth

Amendment and affirmatively decided not to assert it (Pet. 38). Petitioner did not claim the privilege when the order of January 10 was entered, nor when he refused to comply with it, nor when he was ordered to show cause why he should not be held in contempt (Pet. 35–37). On the contrary, at the latter time petitioner explained to the court that his deliberate refusal to provide the requested information was so that he would be in a better bargaining position to negotiate a compromise of his tax liabilities (R. 10). The court found as a fact that his failure to comply with the order of January 10 had nothing whatever to do with an apprehension that answers to the questions might involve him in self-incrimination (R. 28). These findings have been considered by the two courts, and are fully supported by the record.

In the light of these facts, petitioner is thus asserting that his refusal, for reasons of possible personal advantage, to comply with a valid court order to which his counsel consented was nevertheless justified because of the existence of his Fifth Amendment privilege. The short answer is, however, that he did not assert the privilege at any relevant time and it had nothing whatever to do with his refusal. On the facts here, the so-called questions of law raised by petitioner are not presented.

There is no merit in petitioner's contention that he was afforded no opportunity to invoke his privilege. His counsel was present in court when the order of January 10 was entered, and agreed to it. During

the entire five months' period in which the order was outstanding, petitioner at no time nor in any way suggested that he wished to invoke the Fifth Amendment. When ordered to show cause why he should not be held in contempt he answered, but again made no allusion to the Fifth Amendment. Finally, the contempt proceeding was reopened so that petitioner could assert his claimed privilege. At this stage, the least petitioner would be required to show was that his refusal to comply was because of the Fifth Amendment privilege. This he was unable to do, the facts being to the contrary.

There is no conflict, nor is any asserted. The decision below is correct, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.

U. S. GOVERNMENT PRINTING OFFICE, 1957